Jurisdictional Statement

81-524

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

IRENE JOHNSON as surviving spouse of
CHESTER JOHNSON, Deceased,

Appellant,

v.

KERR-McGEE OIL INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE ARIZONA COURT OF APPEALS,
DIVISION TWO

JURISDICTIONAL STATEMENT

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September 14, 1981

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QUESTIONS PRESENTED[1]

The Arizona Court of Appeals has applied the Arizona Workmen's Compensation Act, Arizona Revised Statutes, §23-906, as an absolute defense to a wrongful death action brought in State Court by a Navajo widow for the death of her Navajo husband from cancer contracted while working for a non-Indian employer on the Navajo Reservation:

The basic questions presented are:

1. Whether the United States Constitution and the Navajo Treaty of 1868 preclude the State of Arizona from applying its workmen's compensation law to a Navajo employee working for a non-Indian employer on the Navajo Reservation.
2. Whether extensive federal legislation and control of commercial activity on the Navajo Reservation has resulted in federal preemption which prevents the extension of state workmen's compensation law to injuries sustained by a Navajo employee of a non-Indian employer on the Navajo Reservation.

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[1]28 U.S.C. §2403(b) may be applicable to this proceeding; accordingly, service of this Jurisdictional Statement has been made upon the Attorney General of the State of Arizona.

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IN THE

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No.

IRENE JOHNSON as surviving spouse of CHESTER JOHNSON, Deceased,

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v.

KERR-McGEE OIL INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE ARIZONA COURT OF APPEALS, DIVISION TWO

JURISDICTIONAL STATEMENT

INTRODUCTION

Irene Johnson, the Appellant, appeals from the final Judgment of the Court of Appeals of the State of Arizona, Division Two, entered in this action on April 6, 1981, affirming the trial court's Dismissal of the Complaint. Appellant's Petition for Review to the Supreme Court of the State of Arizona was denied June 16, 1981. The Arizona Court of Appeals held that Appellant's action for wrongful death of her husband, Chester Johnson, was barred by application of Arizona's Workmen's Compensation Law, and that the application of such law did not conflict with the Navajo Treaty of 1868 nor with sovereign Tribal rights under that Treaty.[2]

OPINIONS BELOW

The Opinion of the Arizona Court of Appeals, which was filed on April 6, 1981, appears in Appendix A, *infra*. It is not, at this writing, reported in the Arizona Reports or the Pacific Reporter (Second Series).

The Order of the Arizona Court of Appeals denying Appellant's Motion for Rehearing on May 15, 1981, and the Order of the Arizona Supreme Court of June 16, 1981, denying review, are not reported. They are reprinted in the Appendices hereto, B and C, *infra*, respectively.

JURISDICTION

The Judgment of the Arizona Court of Appeals affirming the dismissal of Appellant's wrongful death action brought

[2]All parties to the proceeding are named in the caption of this case in this Court.

on behalf of herself and her seven minor children was entered on April 6, 1981. (See Appendix A, *infra.*) A Motion for Rehearing was entertained and denied on May 15, 1981. (See Appendix B, *infra.*)

A Petition for Review to the Arizona Supreme Court was timely filed and subsequently denied on June 16, 1981. (See Appendix C, *infra.*)

A Notice of Appeal to this Court was duly filed in the Court of Appeals of the State of Arizona, Division Two, on August 21, 1981, and copies thereof were duly filed with the Superior Court of the State of Arizona in and for the County of Pima on August 26, 1981, and with the Arizona Supreme Court on August 24, 1981. (See Appendix B, *infra.*)

This appeal is being docketed in this Court within 90 days from the denial of Review by the Arizona Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). The Supreme Court has jurisdiction to review the Judgment on appeal in this case. *Japan Line v. County of Los Angeles,* 441 U.S. 434 (1979); *Cohen v. California,* 403 U.S. 15 (1971); *Warren Trading Post v. Arizona State Tax Commission,* 380 U.S. 685 (1965); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921); *American Railway Express v. Levee,* 263 U.S. 19 (1923).

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES

Constitutional Provisions

Article I, Section 8, Clause 3, United States Constitution:

"The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes."

Treaties

Navajo Treaty of 1868, 15 Stat. 667 (June 1, 1868).

The provisions involved are lengthy and the pertinent text has been set forth in Appendix E at page 4, *infra*, pursuant to Rules of the Supreme Court 15.1(f).

Statutes

40 United States Code, §290:

"State Workmen's Compensation Laws; extension to buildings and works of United States. Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State Workmen's Compensation Laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

For the purposes set out in this section, the United States of America vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State Workmen's Compensation Laws are affected, the right, power, and authority aforesaid: Provided, however, That by the passage of this section the United States of

America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State Workmen's Compensation Laws as herein designated: Provided further, That nothing in this section shall be construed to modify or amend the United States Employees' Compensation Act, as amended."

Ariz. Rev. Stat. Ann. §23-906(A) (1971-1980 Supp. to Volume 8):

"Employers who comply with the provisions of §23-961 as to securing compensation, and the employers' workmen's compensation insurance carriers or administrative service representatives, shall not be liable for damages at common law or by statute, except as provided in this section, for injury or death of an employee wherever occurring . . . ."

STATEMENT OF THE CASE

This appeal arises out of an action for wrongful death filed by Mrs. Irene Johnson in Pima County Superior Court, Cause Number 185420, on November 30, 1979. Mrs. Johnson filed this action on behalf of herself and her seven minor children for damages caused by the death of her husband, Chester Johnson. Mr. Johnson died on January 9, 1978, at the age of 40 from squamous cell carcinoma of the lung.[3]

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[3]Appellant also filed a parallel suit in the United States District Court for the District of Arizona, *Johnson v. Kerr-McGee Oil Industries, Inc.*, Number CIV 79-331 TUC MAR which was dismissed on grounds similar to that of the Arizona Court of Appeals, Division Two, in this

(continued)

Chester Johnson was hired as a miner in Kerr-McGee's underground uranium mining facilities near Cove, Arizona, in 1956 and worked in that capacity in various mines within the boundaries of the Navajo Indian Reservation through 1965. Both Mr. and Mrs. Johnson were Navajo Indians, enrolled as members of the Navajo Tribe. At all times relevant to this action, Mr. and Mrs. Johnson lived within the borders of the Navajo Reservation.

Although the mining facilities at which Mr. Johnson worked were owned and operated by Kerr-McGee, they were located on Reservation trust lands leased from the Navajo Tribe pursuant to approval of the Secretary of the Interior.

During his years of employment with Kerr-McGee, Mr. Johnson was exposed to excessive doses of radon daughters. A radon daughter is a radioactive particle released in loose uranium dust. Fortuitously, various United States governmental agencies were involved in monitoring both the health and the levels of radiation exposure sustained by Navajo uranium miners, including Chester Johnson. This data shows that the radiation exposure sustained by Chester Johnson, as well as other similarly situated Navajo uranium

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(footnote continued from preceding page)

case. The United States District Court Opinion appears in Appendix F, *infra*. A timely appeal was filed to the United States Court of Appeals for the Ninth Circuit (No. 80-5682). The Ninth Circuit affirmed the Dismissal on July 24, 1981, based upon the ruling of the Arizona Court of Appeals, Division Two. (The Ninth Circuit's Order appears in Appendix G, *infra*.) A Petition for Certiorari will be timely filed in that action. An action alleging similar injuries to similarly situated Navajo employees was filed by 222 Indian plaintiffs in *Begay v. Kerr-McGee Corp.*, DIV 79-1016 PHX-WPC, in which damages were claimed on behalf of dead and injured uranium miners. That action was similarly dismissed on December 23, 1980, and appealed to the United States Court of Appeals for the Ninth Circuit.

miners, while employed as a uranium miner on the Navajo Reservation for Kerr-McGee was far in excess of recommended health standards; that this fact was known to Kerr-McGee; and that, to a reasonable medical probability, such exposure was the cause of Mr. Johnson's later development of squamous cell carcinoma of the lung and eventual death.

Kerr-McGee moved to dismiss this action for lack of subject matter jurisdiction, arguing that the Arizona Industrial Commission had exclusive jurisdiction over Plaintiff's claims for damages incurred as a result of the death of her husband. The Arizona Workmen's compensation Act, 23 Arizona Revised Statutes §906, precludes an employee from bringing an action for negligence against his employer, and requires, instead, that a workmen's compensation claim be filed within one year after injury.

On June 3, 1980, the trial court entered its Judgment dismissing the action and ruling that the Arizona Workmen's Compensation Act, with its exclusive remedy of workmen's compensation benefits, could be applied by the State of Arizona to a Navajo Indian employed and injured on the Navajo Reservation.

Both before the trial court and on appeal, Mrs. Johnson argued that the application of Arizona's Workmen's Compenstion Law to her case contravened the Navajo Nation's right of sovereignty and Federal preemption doctrine incorporated in the Constitution of the United States, the Treaty of 1868, and other federal laws.

The Opinion of the Arizona Court of Apepals on May 19, 1981 (see Appendix A, *infra*), ruled that Kerr-McGee was not liable for damages for the wrongful death of Mr. Johnson. The Court ruled that application of the Workmen's Compensation Act to Navajo employees employed on the Reservation did not abrogate the Navajo Nation's right to make its own laws and be ruled by them as was reserved by the Tribe in the Treaty of 1868. (See Appendix E, *infra.*)

The Arizona Court of Appeals relied heavily upon 40 U.S.C. §290 in ruling that Congress had intended to extend State Workmen's Compensation Laws onto the Navajo reservation on the theory that a federal statute referring to trust lands generally must by its nature refer to all trust lands, including the Navajo Reservation.[4]

The Court of Appeals neither cited nor attempted to reconcile its ruling with the decisions of this Court in *State of Montana v. United States,* _____ U.S. _____, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); *Central Machinery v. Arizona State Tax Commission,* 448 U.S. 160 (1980);

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[4]In this respect, the Arizona Court of Appeals has misstated Appellant's position with regard to 40 U.S.C. §290. Appellant does not contend, and did not contend before the Arizona Court of Appeals, that 40 U.S.C. §290 violates the Treaty of 1868. Rather, Appellant has consistently contended that the statute and the legislative history underlying the statute demonstrates that Congress did not intend the statute to be applicable to Indians employed upon the Reservation. The Appellant has consistently taken the position that the application of Arizona's Workmen's Compensation Act to an Indian employed upon the Reservation does violate the Treaty of 1868; Appellant has also consistently taken the position that 40 U.S.C. §290 does not authorize the State to violate the Treaty of 1868 in this fashion. (See, *e.g.*, pp. 11-29 of Appellant's Reply Brief before the Arizona Court of Appeals, the text of which appears in Appendix H, *infra.*)

White Mountain Apache Tribe, et al. v. Bracker, 448 U.S. 136 (1980); *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973); *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971); *Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968); *Warren Trading Post v. Arizona Tax Commission,* 280 U.S. 685 (1965); *Williams v. Lee,* 358 U.S. 217 (1959).

THE QUESTION IS SUBSTANTIAL

The issues raised in this action are substantial both in terms of the legal and human consequences of the decision of the Arizona Court of Appeals.

Mrs. Johnson is a young widow with seven minor children. There are numerous "Mrs. Johnsons" on the Navajo Reservation today, as evidenced by *Begay v. Kerr-McGee Corp.*, CIV 79-1016 PHX-WPC (D. Ariz., filed October 1, 1979). The decision of the Arizona Court of Appeals, as well as the District Court Opinions and United States Court of Appeals ruling which was not before this Court at this time (Appendices F and G, *infra*), set a precedent not only of denying a remedy to unwitting victims of private industry but even of denying them a forum in which to seek a just and reasonable remedy.[5]

The legal issues raised in this case are so substantial that this Court has addressed them not once, but many times before. *E.g., Williams v. Lee,* 358 U.S. 217 (1959); *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685 (1965); and *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973).

[5]At the time Mrs. Johnson filed her action for the wrongful death of her husband, there was no jurisdictional provision in the Navajo Tribal Code which would permit her to file a civil action against a non-Indian defendant in Tribal Court.

The logical conclusion of the Arizona Court of Appeals ruling is far reaching. The Treaty of 1868 reserved unto the Navajo Nation the right to "make their own laws and be ruled by them." *Williams v. Lee, supra,* at 220. If the Navajo Nation has the right to enact its own laws, then this certainly must include the right to enact (or choose not to enact) a workmen's compensation act which provides for an exclusive remedy for industrial injuries. The guarantee of the right of sovereignty reserves unto the Navajo Nation the right to decide whether members of the Tribe, living and working on the Reservation, should be governed by a workmen's compensation law or should be left with a common-law right of action against an employer on the Reservation. It is the Navajo Nation, not the State of Arizona, that has the right to make this decision for members of the Tribe residing and working on the Reservation.

Throughout this litigation, Kerr-McGee has taken the position that the right of sovereignty is not involved since it is only an individual Indian, Mrs. Johnson, who will be affected by the outcome of this case. A similar argument was advanced by the State of Arizona in *McClanahan v. Arizona State Tax Commission, supra.* In *McClanahan,* the State argued that the application of Arizona's state income tax law to an "individual Indian" did not involve any issue of Indian sovereignty and thus "has not infringed on Indian rights of self government". *Id.* at 179. This Court rejected such an argument and stated:

> "In fact, we are far from convinced that when a state imposes tax upon Reservation members without their consent, its action can be reconciled with Tribal self determination. . . . Since Appellant is an Indian and since her income is derived wholly from Reservation sources, her activity is totally within the sphere which the relevant treaty and statute leave for the federal government and for the Indians themselves." Id. at 179-180.

The "relevant treaty" involved in *McClanahan* is the identical Treaty involved in the instant case, and the protection guaranteed by that treaty to "Tribal self-determination" is the same protection guaranteed in the facts here presented. It is a dictate of Constitutional proportion that commerce on the Reservation is controlled not by the state, but by federal regulation. U.S. Const. Art. I, §8, cl. 3. The result achieved by the Arizona Court of Appeals permits the State to regulate essential commercial relationships on the Navajo Reservation. It subjects Navajo employees to extensive regulation at the hands of the Arizona Industrial Commission, a regulatory agency of the Arizona State government with full policy power vested in it by the government of the State of Arizona.

The substantive nature of the extension of the Arizona Workmen's Compensation Law to the Navajo reservation and the significant interference and effect it would have on the Navajo right of sovereignty is illustrated by the recent decision of the District Court for the District of Arizona holding that the Navajo court system could invoke civil jurisdiction over non-Indian defendants. *Babbitt-Ford, Inc. v. Navajo Tribe,* No. CIV 80-686 PCT-CAM (D. Ariz. July 14, 1981). If the decision of the Arizona Court of Appeals is not reversed, then the Arizona Workmen's Compensation Act, which confers exclusive jurisdiction to adjudicate claims like Mrs. Johnson's on the Arizona Industrial Commission, will preempt the potential jurisdiction of the Navajo court system. Certainly the exercise of this power to provide a forum for adjudication of claims is an inherent and essential prerogative of sovereignty.

Carried to its ultimate conclusion, the Opinion of the Arizona Court of Appeals permits the complete application of the Arizona Workmen's Compensation Act to Res-

ervation activities. It permits agents of the State of Arizona to enter upon the Reservation; inspect employment facilities, whether operated by Indians or non-Indians; regulate working conditions on the Reservation; and exercise a full panoply of police powers on the Reservation relating to the health, safety, and welfare of employees (whether Indian or non-Indian) on the Reservation. This Court has recently articulated in clearest language that:

> "... A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its Reservaion when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." *Montana v. United States,* No. 79-1128, 49 U.S.L.W. 4296, 4302 (U.S. March 24, 1981).

How much clearer is the real of protected sovereignty when the civil authority sought to be exercised is over a Tribal member and when the land on which the conduct is sought to be regulated is Tribal trust land.

The State of Arizona has, through application of its Workmen's Compensation Act in this case, extended State Court regulatory jurisdiction to all tribal members of the largest Indian Reservation in the United States and, in a back-handed manner, taken from the Navajo Tribe that which was reserved to it by the Treaty of 1868. This Court has in the past vigorously defended rights to self-government of the Indian tribes, and refused to be convinced that application of state law to individual tribal members is anything but a diminution of the tribe's right to make laws and govern its own tribal members. This Court has required that when state jurisdiction is obtained, it be done according to strict compliance with federal law, *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971), and has refused to lightly

imply abrogation of any treaty rights, *Menominee Tribe of Indians v. United States*, 391 U. S. 404 (1968). Pervasive federal regulation and control over commercial activity on the Reservation has prevented state attempts to preempt both federal and tribal prerogatives. *Central Machinery v. Arizona State Tax Commission, supra; McClanahan v. State Tax Commission of Arizona, supra.*

The question, then, is whether this Court will permit the State of Arizona to usurp tribal jurisdiction at the expense of expressly protected Constitutional and treaty rights. This Court has consistently upheld the right of the Navajo Nation to make its own laws and to be ruled by those laws. This Court has also consistently protected the Tribe from intrusions upon the Reservation by the State. This Court should do so in this case.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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September 14, 1981

Appendix A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IRENE H. JOHNSON, as surviving spouse of CHESTER JOHNSON, deceased,	)	
Plaintiff/Appellant,	)	
	)	2 CA-CIV
v.	)	3740
	)	OPINION
KERR-McGEE OIL INDUSTRIES, INC., a foreign corporation,	)	
Defendant/Appellee.	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 184520

Honorable Ben C. Birdsall, Judge

AFFIRMED

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HOWARD, Judge.

Does the immunity from actions at common law or by statute granted to an employer under A.R.S. Sec. 23-906 of our Workmen's Compensation Act apply to a wrongful death action based on the death of an Indian which occurred on the Navajo reservation while the Indian was employed by a private contractor engaged in mining uranium? We find that it does and affirm.

Appellant filed a five-count action against appellee Kerr-McGee. All counts were based upon the death of appellant's

husband from lung cancer which he allegedly acquired while working for appellee in its mining operation on the Navajo reservation. Count I of the complaint was for wrongful death. Count II alleged strict liability by virtue of the deceased's employment in mining, a hazardous occupation as defined by A.R.S. Sec. 23-803. Count III was based on strict liability as a result of the abnormally dangerous activity being carried on by Kerr-McGee and Counts IV and V alleged that Kerr-McGee was liable under the theories of fraud and intentional tort based on its intentional failure to warn the deceased of the dangers and health hazards to which he would be exposed.

Kerr-McGee filed a motion to dismiss for lack of jurisdiction on the ground that exclusive jurisdiction was with the industrial commission. The trial court granted its motion.

Preliminarily, we observe that an Indian has the same rights as any other person to invoke the jurisdiction of state courts to protect legal rights and matters not affecting either the federal government or tribal relations. This right applies to wrongful death actions against a non-Indian defendant for an accident which has occurred on the reservation. Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966). Prosecution of such a claim does not affect the rights of the Navajos to make their own laws and be ruled by them, will not affect their tribal relations and will not affect the rights of the federal government. Paiz v. Hughes, supra.

The record shows that Kerr-McGee has complied with A.R.S. Sec. 23-961 of our Workmen's Compensation Act and therefore cannot be held liable for damages because of the provisions of A.R.S. Sec. 23-906 if the act applies to the accident in question. Relying heavily on Swatzell v. Industrial Commission, 78 Ariz. 149, 277 P. 2d 244 (1954),

appellant contends that our workmen's compensation laws do not extend to the Navajo reservation. Furthermore, that the application of 40 U.S.C. Sec. 290 violates the treaty between the United States and the Navajos.

Kerr-McGee contends that *Swatzell* is distinguishable and that 40 U.S.C. Sec. 290 makes our workmen's compensation laws applicable to the facts here. It also asserts that there is no treaty violation involved. We agree with Kerr-McGee's position.

Before discussion *Swatzell*, it is necessary to set forth the provisions of 40 U.S.C. Sec. 290:

> 'Whatsoever' constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliances with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.
>
> For the purposes set out in this section, the United States of America vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: *Provided, however,* That by the passage of

> this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: *Provided further,* That nothing in this section shall be construed to modify or amend the United States Employee's Compensation Act, as amended." (emphasis in original)

Having set forth the federal statute, we return to the *Swatzell* case. Swatzell, a non-Indian, was injured while working at the Navajo tribal sawmill located on the reservation. He waived his rights to sue his employer and filed a claim with the industrial commission for compensation. The commission denied compensation because it was without jurisdiction to adjudicate the claim. On appeal our supreme court held that the industial commission was correct in its jurisdictional conclusion for two reasons. First, Swatzell was neither employed by the federal government nor by the tribe because the tribe was not operating the enterprise. Although not directly employed by the federal government, Swatzell's immediate supervisor was answerable not to the tribe or tribal council, but to the reservation superintendent and later to civil service employees of the Bureau of Indian Affairs, Resources Department. The court found that Swatzell's employer was an agency or instrumentality of the United States and, therefore, the Arizona Workmen's Compensation Act did not apply because it does not subject federal entities to its provisions.

With respect to 40 U.S.C. Sec. 290, the court held that the statute did not apply because general acts of Congress do not apply to Indian activities unless worded so as to clearly

manifest an intent to include them and no clear intention appears in the act. The court, in examining the Senate Committee Report, SR No. 2294, 74th Congress, Second Session, which accompanied the act, concluded that the intent of Congress was to extend workmen's compensation to mechanics and laborers employed by contractors. Since the tribal sawmill was not a "contractor", the statute did not apply.

The facts here are distinguishable from those in *Swatzell* for the simple reason that Kerr-McGee is a contractor. Moreover, the law has changed since Swatzell was decided. The proposition relied upon in Swatzell regarding general acts of Congress is no longer viable. A general statute in terms applying to all persons includes Indians and their property interests. Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960). The Navajo lands are held by the United States in trust for the Navajo tribe. Accordingly, we hold that 40 U.S.C. Sec. 290 and the Arizona Workmen's Compensation Act apply here.[1]

We are also unable to agree with appellant's claim that the application of 40 U.S.C. Sec. 290 to the facts here abrogates the Navajo's right of self-government secured by the treaty of June 1, 1868, 15 Stat. 667. The Workmen's Compensation Act eliminates litigation and places on business the burden of caring for injured employees, or, when killed, their dependents. Corral v. Ocean Accident & Guaranty Corp.

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[1]See footnote 1 on page four.

[1]Appellant also filed a parallel suit in the United States District Court, Johnson v. Kerr-McGee Oil Industries, Inc., No. CIV 79-331-Tucson-MAR which was dismissed by the federal court on the grounds that 40 U.S.C. Sec. 290 applied. A similar ruling was made in the district court case of Begay v. Kerr-McGee Corporation, No. CIV 79-1016-Phx.

Ltd., 42 Ariz. 213, 23 P.2d 934 (1933). The act provides security for members of the employee's family as well as the employee during periods of disability. Industrial Commission v. Oden, 68 Ariz. 234, 204 P.2d 849 (1949). It also provides the procedure by which claims arising out of industrial accidents may be promptly resolved. Bergstresser v. Industrial Commission, 105 Ariz. 27, 458 P.2d 961 (1969). The Workmen's Compensation Act does not conflict with the treaty nor with tribal rights under the treaty. Cf. Navajo Tribe v. National Labor Relations Board, 288 F.2d 162 (D.C. Cir. 1961), aff'd 366 U.S. 928 (1961) (the provisions of the National Labor Relations Act are applicable to businesses and business operations existing on the Navajo reservation).

Appellant next contends that even if the Workmen's Compensation Act applies, her complaint should not have been dismissed because there was a factual issue as to whether Kerr-McGee properly posted notices in the Navajo language of the employee's right of election as required by the act. We do not agree. The option given an employee, that is, to seek benefits under the Workmen's Compensation Act or maintain a tort action against the employer where the employee fails to post the required notices, is personal to the employee and cannot be exercised by the employee's personal representative. Jackson v. Northland Construction Co., 111 Ariz. 387, 531 P.2d 144 (1975).

As for appellant's fraud count we first turn to Larsen, Workmen's Compensation Law, 13-7.2, Sec. 68.32 which states:

> "The cases involving allegations of deceit, fraud, and false representation can best be sorted out by distinguishing those in which the deceit precedes and helps produce the injury, and those in which the deceit follows the injury and produces a second injury or loss.

> In the first category, a tort action has usually been found barred, since the deceit, so to speak, merges into the injury for which a compensation remedy is provided. . . ."

Accord, Buttner v. American Bell Telephone Company, 41 Cal.App.2d 581, 107 P.2d 439 (1940); Sarber v. Aetna Life Insurance Company, 23 F.2d 434 (9th Cir. 1928); Boyd v. American Mutual Liability Insurance Company, 11 So.2d 102 (La.App. 1942); Brooks v. American Mutual Liability Insurance Company, 7 So.2d 658 (La.App. 1942).

In Wright v. F.M.C. Corporation, 81 Cal.App.3d 777, 146 Cal.Rptr. 740 (1978) an employee filed suit against an employer seeking recovery for injuries received while mixing chemicals. The plaintiff-employee alleged that his employer knew that his job involved contact with noxious chemicals and fraudulently misrepresented the hazards to induce him to seek employment. He further claimed that by reason of his employer's misrepresentations, the provisions of the workmen's compensation laws of California could be avoided.

The court in rejecting the plaintiff's contention, stated:

> " 'The fact that appellant founds his [case] upon the deceit allegedly practiced by [the employer] is immaterial (Buttner v. American Bell Telephone Company, (1940) 41 Cal.App.2d 581, 584, 107 P.2d 439, 441).' " 146 Cal.Rptr. at 740.

As for the count on intentional tort, we first turn to A.R.S. Sec. 23-1022 which states:

> "A. . . . compensation pursuant to the provisions of this chapter for injuries sustained by an employee shall be the exclusive remedy against the employer or any co-employee acting in the scope of his employment . . . except where the injury is caused by the employer's or the co-employee's *wilful misconduct* and the act causing the injury is the *personal act of the employer . . . or if a corporation, on the part of an elected officer thereof.* . . .

B. The term 'wilful misconduct' as employed in this section shall be construed to mean *an act done knowingly and purposely with the direct object of injuring another.*" (emphasis added)

The foregoing statute was construed in Serna v. Statewide Contractors, Inc., 6 Ariz.App. 12, 429 P.2d 504 (1967) where the court stated:

"It is well settled that where a statute expressly defines certain words and terms used in the statute the court is bound by the legislative definition in all cases where the rights of the parties litigant are based upon that statute. (citation omitted). The legislature has set two requirements which must be proved in order to exempt an employee from the Workmen's Compensation Act and permit recovery against the employer. The first is, the act must have had the direct object of injuring another. Gross negligence, or wantonness amounting to gross negligence, is not sufficient to constitute a 'wilfull act' under our statutory definition. It must be shown that the negligence or wantonness was accompanied by the intent to inflict an injury upon another person.

* * *

It would appear our statute as well as the principles governing the interpretation of the workmen's compensation statutes which provide for suit at common law for the employer's wilful misconduct require that there be deliberate intention as distinguished from some kind of intention presumed from gross negligence. 2 Larsen, Workmen's Compensation Law, Sec. 69.20 (1961). The Arizona statute is most restrictive in this regard." 429 P.2d at 507-08.

The necessity for actual intent to injure is pointed out in Larsen, Workmen's Compensation Law, Vol. 2A, 13-5, Sec. 68-13 where it is stated:

"Since the legal justification for the common-law action is the non accidental character of the injury from

the defendant employer's standpoint, the common-law liability of the employer cannot be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of genuine intentional injury."

It is clear here that the basis of appellant's claim for an intentional tort is the failure to warn. We find that her allegations are insufficient to take the conduct outside of the exclusive remedy of the Workmen's Compensation Act. Such allegations justify the granting of a motion to dismiss for lack of jurisdiction. Cf. Sanford v. Presto Manufacturing Company, 92 N.M. 746, 594 P.2d 1202 (App. 1979).

Affirmed.

LAWRENCE HOWARD, Judge.

CONCURRING:

JAMES D. HATHAWAY, Chief Judge.

PHILIP FAHRINGER, Superior Court Judge.

NOTE: Judge Ben C. Birdsall having recused himself in this matter, Judge Philip Fahringer was called to sit in his stead and participate in the determination of this decision.

Appendix B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IRENE H. JOHNSON, as surviving spouse of CHESTER JOHNSON, deceased,	) 2 CA-CIV 3740
Plaintiff/Appellant,	) ORDER
v.	) (PIMA County Superior Court Cause No. 184520)
KERR-McGEE OIL INDUSTRIES, INC., a foreign corporation,	
Defendant/Appellee.	

IT IS ORDERED Motion for Rehearing DENIED.
Dated: May 15, 1981.

/s/ James D. Hathaway,
Chief Judge.

/s/ Lawrence Howard,
Judge.

/s/ Philip Fharinger,
Judge, Superior Court.

No. 2 CA-CIV 3740
IRENE H. JOHNSON, etc. v. KERR-McGEE INDUSTRIES, INC., etc.
Order
P. 2

Copy of the foregoing mailed this 15 day of May, 1981, to:

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INDUSTRIAL COMMISSION OF ARIZONA
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Appendix C

S. ALAN COOK
CLERK

ANNA L. CATES
CHIEF DEPUTY CLERK

Supreme Court
STATE OF ARIZONA
201-WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

June 17, 1981

IRENE H. JOHNSON, as surviving spouse of CHESTER JOHNSON, deceased,	) Supreme Court) No. 15494-PR
Appellant,	)
vs.	) Court of Appeals) No. 2 CA-CIV
KERR-McGEE OIL INDUSTRIES, INC., a foreign corporation,	) 3740
Appellee.	) Pima County) No. 184520

The following action was taken by the Supreme Court of the State of Arizona on June 16, 1981 in regard to the above-entitled cause:

"ORDERED: Petition for Review = DENIED."

Record returned to the Court of Appeals, Division Two, Tucson, this 17th day of June, 1981.

S. ALAN COOK, Clerk

By Linda J. Quintana
Deputy Clerk

TO:

Stanley G. Feldman, Esq., Ms. Janice A. Wezelman, John L. Tully, Esq., Miller, Pitt & Feldman, 111 South Church, Tucson, Arizona 85701

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William P. Mahoney, Jr., Esq., Mahoney and Rood, 11 West Jefferson, Suite 403, Phoenix, Arizona 85003

Supreme Court No. 15494-PR
June 17, 1981
Page Two

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Calvin Harris, Chief Counsel, Industrial Commission of Arizona, 1601 West Jefferson Street, Phoenix, Arizona 85007

Richard F. Campbell III, Esq., Fellers, Snider, Blankenship, Bailey & Tippens, Suite 2700, First National Center, Oklahoma City, Oklahoma 73102

Hon. William E. Druke, Presiding Judge, Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701

Elizabeth Urwin Fritz, Clerk, Court of Appeals, Division Two, 415 West Congress, Tucson, Arizona 85701

Appendix D

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IRENE H. JOHNSON, as surviving spouse of CHESTER JOHNSON, deceased,	)
PLAINTIFF/APPELLANT	) NO. 2-CA-CIV 3740
VS.	) (Arizona Supreme Court Cause No. 15494-PR
KERR-McGEE OIL INDUSTRIES, INC., a foreign corporation,	) (Pima County Superior Court Cause No. 184520)
DEFENDANT/APPELLEE.	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, notice is hereby given that Irene H. Johnson, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals, Division Two, of the State of Arizona, affirming the trial court's dismissal of the complaint, entered in this action on April 6, 1981, motion for Rehearing denied May 15, 1981, Petition for Review to the Supreme

Court of the State of Arizona denied June 16, 1981.
This appeal is taken pursuant to 28 U.S.C. §1257(2).

MILLER, PITT & FELDMAN, P.C.

/s/ By Stanley G. Feldman
Stanley G. Feldman
MILLER, PITT & FELDMAN, P.C.
111 S. Church Avenue
Tucson, Arizona 85701-1680
Counsel for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rules 10.2 and 28, Rules of the Supreme Court of the United States, on this 21st day of August, 1981, three copies of the Notice of Appeal to the Supreme Court of the United States were mailed, by depositing in a United States Post Office or mailbox, first-class postage prepaid, to each of the following:

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Everett, Bury & Moeller, P.C.
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Attorneys for Appellee

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Lee Begay et alia

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Calvin Harris
Legal Department
The Industrial Commission of Arizona
Phoenix, Arizona
Attorneys for Amicus Curiae the
Industrial Commission of Arizona

I further certify that a copy of the Notice of Appeal to the Supreme Court of the United States was mailed, first-class postage prepaid, for filing to the following:

Clerk
Supreme Court of the State of Arizona
Room 201 South West Wing
1700 West Washington
Phoenix, Arizona 85007

Clerk
Superior Court of the State of Arizona
111 West Congress
Tucson, Arizona 85701

I further certify that all parties required to be served have been served.

/s/ Stanley G. Feldman
Stanley G. Feldman
MILLER, PITT & FELDMAN, P.C.
111 S. Church Avenue
Tucson, Arizona 85701-1680
Counsel for Appellant

Appendix E

Treaty between the United States of America and the Navajo Tribe of Indians; Concluded June 1, 1868; *Ratification advised July* 25, 1868; *Proclaimed August* 12, 1868.

ANDREW JOHNSON,

June 1, 1868.

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Preamble.

WHEREAS a treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States, and Barboncito, Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit: —

Contracting parties.

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness: —

Peace and friendship.

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

Offenders among the whites to be arrested and punished;

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

among the Indians, to be given up to the United States, or, &c.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner

Rules for ascertaining damage.

of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

Reservation boundaries.

ARTICLE II. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly, which cañon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Who not to reside thereon.

Buildings to be erected by the United States.

ARTICLE III. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and blacksmith shop, not to cost exceeding one thousand dollars each; and a school-house and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

Agent to make his home and reside where.

ARTICLE IV. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

His duties.

Heads of families desiring to commence farming may select lands, &c.

ARTICLE V. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Effect of such selection.

Best Copy Available

Persons not heads of families.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

Certificate of selection to be delivered, &c.;

to be recorded.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land Book."

Survey.

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

Alienation and descent of property.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

Children between six and sixteen to attend school.

ARTICLE VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

Duty of agent.

School-houses and teachers.

The provisions of this article to continue for not less than ten years.

Seeds and agricultural implements.

ARTICLE VII. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

Delivery of articles in lieu of money and annuities.

ARTICLE VIII. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Clothing, &c.

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian — each Indian being encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

Indians to be furnished with no articles they can make.

Census.

Best Copy Available

Annual appropriations in money for ten years;

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

may be changed.

Army officer to attend delivery of goods, &c.

Stipulations by the Indians as to outside territory;

ARTICLE IX. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

railroads;

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

residents, travellers, wagon trains;

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

women and children;

4th. That they will never capture or carry off from the settlements women or children.

scalping;

5th. They will never kill or scalp white men, nor attempt to do them harm.

roads or stations;

damages;

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

military posts and roads.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

Cession of reservation not to be valid, unless, &c.

ARTICLE X. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article —— of this treaty.

Indians to go to reservation when required.

ARTICLE XI. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

Appropriations how to be disbursed.

ARTICLE XII. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

Removal.

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

Sheep and goats.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

Cattle and corn.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

Remainder.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

Removal, how made.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

Reservation to be permanent home of Indians.

ARTICLE XIII. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

Penalty for leaving reservation.

Execution.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.

S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, Chief.	his x mark.
ARMIJO.	his x mark.
DELGADO.	
MANUELITO.	his x mark.
LARGO.	his x mark.
HERRERO.	his x mark.
CHIQUETO.	his x mark.
MUERTO DE HOMBRE.	his x mark.
HOMBRO.	his x mark.
NARBONO.	his x mark.
NARBONO SEGUNDO.	his x mark.
GAÑADO MUCHO.	his x mark.

Council.

RIQUO.	his x mark.
JUAN MARTIN.	his x mark.
SERGINTO.	his x mark.
GRANDE.	his x mark.
INOETENITO.	his x mark.
MUCHACHOS MUCHO.	his x mark.
CHIQUETO SEGUNDO:	his x mark.
CABELLO AMARILLO.	his x mark.
FRANCISCO.	his x mark.
TORIVIO.	his x mark.
DESDENDADO.	his x mark.
JUAN.	his x mark.
GUERO.	his x mark.
GUGADORE.	his x mark.
CABASON.	his x mark.
BARBON SEGUNDO.	his x mark.
CABARES COLORADOS.	his x mark.

Attest:

GEO. W. G. GETTY,
Col. 37th Inf'y, Bt. Maj. Gen'l U. S. A.

B. S. ROBERTS,
Bt. Brg. Gen'l U. S. A., Lt. Col. 3d Cav'y.

J. COOPER MCKEE,
Bt. Lt. Col. Surgeon U. S. A.

THEO. H. DODD,
U. S. Indian Ag't for Navajos.

CHAS. MCCLURE,
Bt. Maj. and C. S. U. S. A.

JAMES F. WEEDS,
Bt. Maj. and Asst. Surg. U. S. A.

J. C. SUTHERLAND,
Interpreter.

WILLIAM VAUX,
Chaplain U. S. A.

Ratification. And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:—

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, July 25, 1868.

Resolved, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Navajo Indians, concluded at Fort Sumner, New Mexico, on the first day of June, 1868.

Attest:

GEO. C. GORHAM,
Secretary,
By W. J. McDONALD,
Chief Clerk.

Proclamation. Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the City of Washington, this twelfth day of August, in the [SEAL.] year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

ANDREW JOHNSON.

By the President:
W. HUNTER,
Acting Secretary of State.

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IRENE H. JOHNSON, as surviving spouse of CHESTER JOHNSON, deceased. Plaintiff, vs. KERR-McGEE OIL INDUSTRIES, INC., a foreign corporation, et al., Defendants.	No. CIV 79-331-TUC-MAR ORDER

Plaintiff filed this diversity action to recover damages for the death of her husband, allegedly caused by the wrongful acts of the defendant, the decedent's employer from 1957 to 1962. Defendant has moved to dismiss claiming that this court lacks subject matter jurisdiction and that plaintiff has failed to state a claim on which relief can be granted. Both motions are based on the same contention — that under Arizona law, which this court must apply in a diversity action, the plaintiff's sole remedy for her decedent's injuries is the submission of a claim to the Arizona Industrial Commission.

Plaintiff does not deny that where the issue is whether a workmen's compensation statute provides an injured employee an exclusive remedy, the general rule is that a federal court in a diversity action must follow the state law. *See*

Kottis v. United States Steel Corp., 543 F.2d 22 (7th Cir. 1976); *Allen v. Estate of Carman*, 486 F.2d 490 (5th Cir. 1973). Plaintiff seeks to avoid application of the general rule in this case on the grounds that the decedent was a member of the Navajo Indian Tribe and that the site of the injury was on the reservation, therefore precluding application of state law under the doctrine of *Williams v. Lee*, 358 U.S. 217 (1959). This court does not need to apply *Williams* to determine the applicability of Arizona's workmen's compensation laws to the Indian reservation, however, since Congress has apparently already decided that question by statute.

In 40 U.S.C. §290, Congress provided that the states could apply their workmen's compensation laws

> to all lands and premises owned or *held* by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of [the] State.

(emphasis added). The Supreme Court has stated that the result of this statute is that state workmen's compensation laws apply to persons who live and work in federal areas. *See Evans v. Cornman*, 398 U.S. 419, 424 (1970). In other contexts, the Supreme Court has made clear that Indian reservations are federal areas or enclaves, *see Cappaert v. United States*, 426 U.S. 128, 138 (1976); *United States v. District Court for Eagle County*, 401 U.S. 520-522-23 (1971), and that federal statutes regarding lands held by the United States apply to such reservations. *See Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 810 (1976). Nevertheless, plaintiff argues that the statute is inapplicable here because federal statutes do not apply to Indians unless specifically worded to do so.

This argument was foreclosed by *F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), where the Indians were

arguing that the federal statute there involved did not apply to them because it was only a "general" Act of Congress. The Court rejected this argument in broad language:

it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.

362 U.S. at 116. Plaintiff attempts to distinguish *Tuscarora* on the ground that the Indian land there was held by the Indians in fee simple, while the reservation here is held by the United States in trust for the benefit of the Navajo Tribe. The Court in *Tuscarora* did not base its holding of general application on the type of title held by the Indians, and this Court sees no reason to do so in this case.

Plaintiff further attempts to avoid application of §290 by arguing that the Arizona Supreme Court held the statute inapplicable to Indian Reservation lands in *Swatzell v. Industrial Com'n,* 78 Ariz. 149, 277 P.2d 244 (1954). *Swatzell* is not persuasive authority, however, since it applied the principle of non-applicability to Indians of general statutes which *Tuscarora* specifically rejected. *See* 277 P.2d at 248.

Since the Court must conclude that 40 U.S.C. §290 allows the application of Arizona's workmen's compensation statutes to the Indian reservation, plaintiff's right to maintain this lawsuit must be determined under those statutes.

Application of the Arizona Statute

Under Arizona law, an injured employee who falls within the workmen's compensation scheme has two mutually exclusive remedies. He may file a claim with the Industrial Commission for benefits, or he may sue his employer in tort. In order to exercise his option to sue, the employee must, prior to the injury, have filed a document rejecting his right to

proceed for workmen's compensation benefits. Without such a filing, Arizona law conclusively presumes the employee to have elected recovery under the workmen's compensation statutes, A.R.S. §23-906(C), and holds the employer immune from suit. §23-906(A).

There are two exceptions to this general preclusion of suit rule which plaintiff attempts to take advantage of. First, §23-906(D) requires employers to post notices explaining the employees' options and §23-906(E) provides that if an employer fails to post such notices, the employee may elect to sue even if he had not previously filed a rejection notice. Plaintiff alleges that defendant did not post the proper notices.

Assuming the allegation is true, plaintiff may not take advantage of the exception set out in §23-906(E). The Arizona Supreme Court has held that the statutory right of election set out in §906(E) is not available to spouses or personal representatives of deceased employees, and may only be exercised by the employee. *Jackson v. Northland Constr. Co.*, 111 Ariz. 387, 531 P.2d 144, 147 (1975). Plaintiff, as spouse of the deceased employee, is therefore precluded from exercising the option provided by §906(E).

Plaintiff next argues that a second exception to the single remedy structure of the state law applies to this case. Where an employee's injuries are the result of "willful misconduct" on the part of the employer, A.R.S. §23-1022(A) provides that the employee may elect to either sue the employer or file a claim for benefits. The statute defines "willful misconduct" in §23-1022(B) as an "act done knowingly and purposely with the direct object of injuring another." In her complaint plaintiff did not allege that defendant acted with the direct object of injuring the decedent. Rather, she alleged that defendant's conduct was the result of "a reckless and wanton disregard" of decedent's safety, since decedent was not

warned of the dangerous conditions of the work place. Plaintiff's complaint, ¶¶ IX, XVIII, XIX, and XXI.

Even assuming that these allegations are factual, under the Arizona cases interpreting §23-1022(B), they are insufficient to establish the willful misconduct required by the statute. Directly on point is *Lowrey v. Universal Match Corp.*, 6 Ariz. App. 98, 430 P.2d 444, 445 (1967), where the plaintiff alleged that his injuries were a result of defendant's failure to warn him of, and to take measures to prevent, highly dangerous conditions in the work place. Plaintiff further alleged, as did the plaintiff here, that the defendant knew that its failure to warn the employee of the danger or to take safety precautions would cause him great bodily harm. The Court of Appeals held that these allegations were simply insufficient to establish "willful misconduct" as defined by §1022(B). *In accord, Serna v. Statewide Contractors, Inc.*, 6 Ariz. App. 12, 429 P.2d 504 (1967).

In summary, the Court finds that Arizona's workmen's compensation statutes apply to this case and that under that statutory scheme, as interpreted by Arizona courts, the plaintiff appears to be barred from suit against the employer, since she has not made sufficient allegations to fall within the only available exception. On these facts the Court would normally dismiss the complaint, without prejudice, for failure to state a claim. In this instance, however, a dismissal without prejudice would in reality be a dismissal with prejudice, if plaintiff's counsel is correct in his assertion that the applicable statute of limitations has expired. Other federal courts faced with a similar problem have given plaintiffs the opportunity to conduct limited discovery or the issue of the court's power to hear the case rather than dismiss the action. *See Canavan v. Beneficial Finance Corp.*, 553 F.2d 860, 865 (3d Cir. 1977); *Budde v. Ling-Temee-Vought, Inc.*, 511 F.2d 1033, 1035 (10 Cir. 1975).

Therefore, to protect defendant's rights under the Arizona workmen's compensation statutes and at the same time give the plaintiff a full opportunity to demonstrate the merits of her claim IT IS HEREBY ORDERED:

that the Court's ruling on the motion to dismiss will be reserved for ninety (90) days from the date of this Order;

that during this period plaintiff may conduct discovery limited to the issue of defendant's "willful misconduct," as defined by state law; and

that within this period the plaintiff present to the Court evidence of willful misconduct, or indicate the lack thereof, to assist the Court in its ruling.

Dated: May 19, 1980

/s/ Mary Anne Richey
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IRENE H. JOHNSON, as surviving spouse of CHESTER JOHNSON, deceased.	)
Plaintiff,	)
vs.	) No. CIV
KERR-McGEE OIL INDUSTRIES, INC., a foreign corporation, et al.,	) 79-331-TUC-MAR
	) ORDER
Defendants.	)

On request of counsel this matter has been submitted without oral argument and the hearing originally set for September 15, 1980 is vacated. After consideration of the authorities cited by both parties, the Court declines to reconsider its Order of May 19, 1980. Contrary to plaintiff's assertion, *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99 (1960), has been repeatedly cited as authority for applying general statutes to Indians and Indian reservations. *See Davis v. Morton,* 469 F.2d 593, 597 (10th Cir. 1972); *Navaho Tribe v. N.L.R.B.,* 288 F.2d 162, 164-65 (D.C. Cir., *cert. denied,* 366 U.S. 928 (1961); 29 C.F.R. §1975.4(3). Plaintiff's motion to reconsider is therefore denied.

Since more than 90 days have elapsed since the Court's Order of May 19, 1980, and since plaintiff has furnished the Court with no evidence of willful misconduct on the part of the defendant as required by the Court, plaintiff is barred from suit against the employer under Arizona workmen's compensation statutes. The amended complaint is therefore dismissed.

Dated: August 21, 1980

/s/ Mary Anne Richey
UNITED STATES DISTRICT
JUDGE

EXHIBIT "A"

Appendix G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IRENE H. JOHNSON, as surviving spouse of CHESTER JOHNSON, deceased,	) No. 80-5682
Plaintiff-Appellant,	) DC # CV 79-331 TUC MAR Arizona (Tucson)
vs.	
KERR-McGEE OIL INDUSTRIES, INC., a foreign corporation, et al.,	
Defendants-Appellees.	) **ORDER**

Before: TANG and CANBY, Circuit Judges

The motions for extensions of time are granted. Appellant's opposition to the motion to dismiss, appellee's reply and their opposition to appellant's cross-motion for stay, and appellant's reply to appellees' opposition are ordered filed.

Appellees' motion to dismiss the appeal is denied, but the district court's judgment dismissing the action below is summarily affirmed in light of the final decision by the Supreme Court of the State of Arizona in No. 15494-PR.

MoCal 7/20/81

III.

40 U.S.C. §290 DOES NOT PERMIT A STATE TO APPLY ITS WORKMEN'S COMPENSATION LAW TO INDIANS EMPLOYED ON THE RESERVATION.

Absent an act of Congress, a state may not assume jurisdiction over Indians on the reservation. *Williams v. Lee, supra.* Kerr-McGee argues that by enacting 40 U.S.C. §290 Congress has authorized the states to apply their workmen's compensation laws to Indians working on the reservation. While Kerr-McGee acknowledges that this statute does not expressly confer such jurisdiction on the states, Appellee cites *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99 (1960), for the proposition that a general act of Congress applies to Indians unless Congress manifests an express intent to exclude Indians from the operation of the act. In reliance upon *Tuscarora,* Kerr-McGee argues that, since Congress did not expressly exclude Indians from the operation of 40 U.S.C. §290, the statute permits the states to assume workmen's compensation jurisdiction over the reservation.

We submit that Kerr-McGee's position is incorrect for essentially two reasons. First, in the absence of express statement in the statute, the *Tuscarora* rule that statutes of general applicability generally apply to Indians does not apply to cases dealing with statutes which would extend state jurisdiction to Indian reservations thereby diminishing Indian sovereignty in violation of federal treaty obligations. Second, the legislative history underlying 40 U.S.C. §290 shows that Congress did not intend to include reservation Indians within the application of the act.

A. A Congressional transfer of jurisdiction from the tribe to the state must be express.

It may be helpful to begin the analysis with a brief discussion of what this case does not involve. First, we are not here dealing with the right of the state to apply its laws to Indians who have left or have never inhabited the reservation. In such cases, Indians have neither the protection of a treaty nor the rights of self-government and the state therefore has jurisdiction to treat Indians as it would any other resident of the state. See, e.g., *F.P.C. v. Tuscarora Nation, supra; Organized Village of Kake v. Egan,* 369 U.S. 60 (1962).[3] Nor does this case concern the right of the state to exercise jurisdiction over non-Indians on the reservation. We acknowledge the state has jurisdiction over non-Indian activities on the reservation, as long as the exercise of state jurisdiction does not interfere with Indian

[3]In this respect, the rule announced in *Tuscarora* may be viewed simply as a canon of statutory construction that applies in cases involving non-reservation Indians.

In *United States v. Winnebago Tribe of Nebraska,* 542 F.2d 1002 (8th Cir. 1976), the court recognized that the *Tuscarora* rule does not apply where treaty rights are involved. The court stated:

> "Rights secured by treaty will not be deemed to have been abrogated or modifed absent a *clear expression of Congressional purpose*, for 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' *Menominee Tribe v. United States,* 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968). Accord, *United States v. White,* 508 F.2d 453 (8th Cir. 1974). The United States reliance upon *Federal Power Com. v. Tuscarora Indian nation,* 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960) for a contrary canon of construction, i.e., that the general statutes of the United States apply to Indians and non-Indians alike, is misplaced. Contrary to the facts presented here, the Indian lands taken in *Tuscarora* were not held in trust by the United States and were not reserved by treaty. As we stated in *United States v. White, supra,* at 455, the general rule of *Tuscarora* does not apply when the interest sought to be affected is reserved to the Indians by treaty." *Id.*, at 1005, (emphasis added).

sovereignty rights. See, e.g., *Department of Revenue v. Hane Construction Co.*, 115 Ariz. 243, 564 P.2d 932 (1977); *United States v. McBratney*, 104 U.S. 621 (1882). We are not here concerned with acts of Congress that apply law and jurisdiction equally to all citizens of the United States. *See*, e.g., *Choteau v. Burnet*, 283 U.S. 691 (1931), (in which the Supreme Court held that reservation Indians are subject to federal income taxes); *National Labor Relations Board v. Navajo Nation, supra*, (in which the court found that the National Labor Relations Act applied to Indians working on the reservation in the same manner that the act applied to all employees throughout the United States). In such cases, there is no reason to assume that a general act of Congress which enacts federal law is applicable to all residents of the United States should not equally apply to those citizens who reside on an Indian reservation.

Rather, the case at bench concerns only the issue of whether an act of Congress should be interpreted to apply state law and jurisdiction in such a manner that it violates a treaty with an Indian Nation, divests the tribe of jurisdiction, and passes jurisdiction to the state government.

We submit that such a result will only be found where Congress has manifested an *express* intent to transfer jurisdiction from the tribe to the state. In other words, the pronouncements of the United States Supreme Court, traditional notions of Congressional intent, and the traditional rules of statutory construction, require that such a transfer of jurisdiction from the tribal government to the state government can only be accomplished by an express act of Congress.

For example, in *Williams v. Lee*, the United States Supreme Court stated:

"Congress has . . . acted consistently upon the assump-

tion that the states have no power to regulate the affairs of Indians on a reservation . . . Significantly, when Congress has wished the states to exercise this power it has *expressly* granted them the jurisdiction which *Worcester v. Georgia* has denied." U.S. at (emphasis added).

In *McClanahan v. State Tax Commission, supra,* the court again examined the scope of the state jurisdiction over the reservation and stated:

"The principles governing the resolution of this question are not new. On the contrary, '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' Rice v. Olsen, 324 U.S. 786, 789 (1945)

"... As a leading test on Indian problems summarizes the relevant law: 'State laws generally are not applicable to tribal Indians on an Indian reservation *except where Congress has expressly provided that State laws shall apply.* It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of *express authority* conferred upon the State by act of Congress' U.S. Dept. of the Interior, Federal Indian law 845 (1958) (hereinafter Federal Indian Law). . . .

"The Treaty [of 1868] nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes. But the document is not to be read as an ordinary contract agreed upon by parties dealing at arms length with equal bargaining positions. . . .

"It is circumstances such as these which have lead this Court in interpreting Indian treaties, to adopt the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' Carpenter v. Shaw, 280 U.S. 363, 367 (1930). When this canon of construction is taken together with the tradition of Indian independence

described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that this Court has interpreted the Navajo treaty to preclude the extension of state law—including state law—to Indians on the Navajo Reservation. [Cites omitted]

"Moreover, since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation. . ." *Id.*, at 168-175. (Emphasis added)

In *Bryan v. Itasca County,* 426 U.S. 373 (1976), the United States Supreme Court examined a statute which did transfer jurisdiction from the tribe to the state. The Court addressed the question of whether § 4(a) of Public Law 280, which delegated general jurisdiction to certain states over certain Indian reservations, permitted the state to apply its tax laws to Indians on the reservation. The statute in question provided that:

"Each of the states . . . listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . and those civil laws of such State . . . that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State. . ."

In analyzing the statute, the Supreme Court noted that the statute did not expressly authorize the states to tax reservation income or property. The Court then recognized that there was nothing in the legislative history from which to infer such a Congressional intent.

"Of special significance for our purposes, however, is the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations. Neither the Committee Reports nor the floor discussion in either House mentions such authority. This omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress. . ." *Id.*, at 381.

The Court also noted that there was nothing in the legislative history to suggest that Congress intended to divest the Indian tribe of its sovereign right of self-government in the area of taxation:

"And nothing in the legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,' *United States v. Mavurie,* 419 U.S. 544, 557 (1975) ____ a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. . ." *Id.*, at 388.

Additionally, the Court stated that applicable canons of statutory construction would preclude an interpretation that the statute was intended to confer general tax jurisdiction over the reservation to the state:

"Finally, in construing this 'admittedly ambiguous' statute, [cite omitted], we must be guided by that 'eminently sound and vital canon,' [cite omitted], that 'statutes passed for the benefit of dependent Indian tribes. . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'

> [cites omitted]. This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities. [Cites omitted]. 'This is so because . . . Indians stand in a special relation to the federal government from which the states are excluded *unless the Congress has manifested a clear purpose to terminate* [*a tax*] *immunity and allow states to treat Indians as part of the general community.'* [cite omitted]. . ." *Id.*, at 392 (emphasis supplied)[4]

The Supreme Court finally determined that the termination of a tax immunity (i.e., the extension of state tax jurisdiction over reservation Indians) must be interpreted in the same fashion as the complete termination of the reservation:

> "Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the . . . Act. This being so, we are not inclined to infer an intent to terminate. . . . *A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.*" *Id.*, at 393, quoting *Mattz v. Arnett*, 412 U.S. 481, 504-505 (1973). (Emphasis supplied.)

Thus, *Williams, McClanahan,* and *Bryan* demonstrate that an act of Congress will only be interpreted so as to extend state jurisdiction over the Indian reservation where congressional intent to achieve such a result is clearly expressed in the statute or in the legislative history underlying the statute. In this case, there is nothing in 40 U.S.C. §290 which would expressly indicate Congress intended to modify or abrogate its various treaties with

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[4]In the same fashion, we submit a Congressional determination to terminate the immunity of reservation Indians to the state's workmen's compensation jurisdiction (i.e., to pass such jurisdiction from the tribe to the state) must be expressed on the face of the act or be clear from the surrounding circumstances or legislative history.

Indian nations by divesting the various tribes of their sovereign governmental authority to legislate on the reservation; nor is there anything in the statute indicating that Congress intended to vest such jurisdiction in the hands of the individual states. Moreover, the legislative history underlying this act does not support a finding that Congress intended such a result.

B. Congress did not contemplate or intend that the statute should apply to reservation Indians.

The legislative history underlying 40 U.S.C. §290, and the circumstances surrounding the enactment of this statute, show that this statute was not intended to apply to Indians residing upon the reservation. Rather, when the statute was adopted in 1938, it was Congress's intent to fill a "gap" in the state's workmen's compensation coverage. This "gap", however, did not exist on the reservation and there is no indication in the legislature that Congress intended to offset the reservation in any manner.

Prior to 1934, it was generally held that a resident of a state who was working on federally owned lands was covered by his state's workmen's compensation act. For example, in *Lynch's Case,* 281 Mass. 454, 183 N.E. 834, 86 A.L.R. 285 (1932), the Massachusetts Supreme Court held that that state's workmen's compensation act could be given extraterritorial force and would apply to an employee while working on the construction of the United States Post Office for a private contractor. In *Loney v. State Industrial Accident Board,* 87 Mont. 191, 286 P.2d 408 (1930), the Court found the Montana Act to be applicable to an employee of a private contractor while engaged in road construction in a national park. In *State ex rel. Grays Harbor Construction Company v. Department of Labor*

and Industries, 167 Wash. 507, 10 P.2d 213 (1932), the Washington Supreme Court held that the Washington Act applied to an employee working on a highway construction project within a national park. *C. F. Nickell v. Department of Labor and Industries,* 164 Wash. 589, 3 P.2d 1005 (1931).

Significantly, while the states were free to apply their workmen's compensation laws to private employees on federal land, the states could not apply such laws to Indians employed on the Indian reservation. The states were preclude under the doctrine of *Worcester v. Georgia,* 6 Pet. 515, 8 L.Ed. 483 (1832) from assuming jurisdiction over Indians on the reservation. In this respect, the states have never been permitted to assume jurisdiction over Indians on the reservation, and thereby infringe on the tribe's right of self-government, absent an act of Congress. *See,* e.g., *Williams v. Lee, supra.*

In 1934, the United States Supreme Court held, in *Murray v. Garrick & Co.,* 291 U.S. 315 (1934), that the Washington State workmen's compensation act provided no remedy to a widow whose husband was killed while working for a private contractor at a federal navy yard. The Court noted that, at the time that the navy yard was ceded to the federal government, Washington did not have a workmen's compensation act and the federal government therefore did not accept the land subject to a state compensation act. The Court held that, absent an act of Congress, the state could not apply its workmen's compensation act in an area under the exclusive jurisdiction of the United States.

The decision in *Murray* created a "gap" in the field of workmen's compensation law. Subsequent to *Murray,* an employee of a private contractor working in a federal enclave was not subject to his state's workmen's compensation act. Such an employee had no coverage under the federal

workmen's compensation act, 5 U.S.C. §8101, since the federal act applied only to employees of the federal government.

Congress attempted to draft legislation to fill this "gap". Initially, the Senate drafted two proposed bills. S.4671 was designed to permit the application of state workmen's compensation law to "injuries and deaths within national parks or upon other federal property". This bill would thus have closed the "gap" in factual situations present in cases such as *Loney v. State Industrial Accident Board, supra,* and *State ex rel. Grays Harbor Construction Co. v. Department of Labor and Industries, supra.* (See Senate Report No. 2080, 74th Congress, 2nd Session, copy attached hereto as Appendix "A".)

S.3238 was designed to permit the application of state workmen's compensation law "on public buildings and public works". (See Senate Report No. 2119, 74th Congress, 2nd Session, copy attached hereto as Appendix "B".) This bill would have therefore have closed the "gap" in cases such as *Lynch's Case, supra.* Additionally, the Senate Report accompanying this proposed bill acknowledged that some states, such as Arkansas and Mississippi, had no workmen's compensation act and that in other states, compliance with a compensation act was optional rather than mandatory. (*Id.*) This bill, as originally proposed by the Senate, would have closed this additional "gap" by applying the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §901, in any situation where an employee was working on a federal project under circumstances where he was not covered by a mandatory state workmen's compensation act. (*Id.*)

An additional bill, H.R. 12599, was introduced in the House of Representatives. (See House of Representatives Report No. 2656, 74th Congress, 2nd Session, attached as

Appendix "C".) The House of Representatives bill allowed the individual states to apply their workmen's compensation laws on property owned by the United States government. (*Id.*) This bill did not require any state to enact a workmen's compensation law, nor did the House Bill subject any private employees to any federal workmen's compensation law. H.R. 12599 was passed by the House of Representatives and submitted to the Senate. (See Senate Report No. 2294, 74th Congress, 2nd Session, attached hereto as Appendix "D".) The bill was passed by the Senate and became what is now known as 40 U.S.C. §290.

Thus, as enacted by Congress, the statute does not divest any local government of its sovereign right to enact, or not enact, a workmen's compensation law. The statute does not require the local government to enact a mandatory workmen's compensation law. It does not create an all-encompassing rule requiring an employee on federal land to surrender any common law claim for personal injury against his employer.

None of the proposed statutes, nor any of the reports accompanying the proposed statutes, address the issue of state jurisdiction over Indian reservations. The legislative history accompanying this act does not address any problems pertaining to Indian reservations or the abrogation of treaty rights. In fact, the word "Indian" is not even mentioned in the legislative history.

In short, the circumstances surrounding the enactment of 40 U.S.C. §290, and the legislative history accompanying that act, indicate that Congress only intended to restore the status quo that existed prior to *Murray v. Garrick & Co., supra.* As suggested earlier, prior to *Murray,* the states could apply their workmen's compensation law to state residents on federal land; the states could not apply their workmen's compensation laws to Indians on the reservation.

When viewed in this respect, the Arizona Supreme Court's decision in *Swatzel v. Industrial Commission*, 78 Ariz. 149, 277 P.2d 244 (1954), is entirely correct. *Swatzel* held that the Industrial Commission of the State of Arizona had no jurisdiction over Indians employed on the reservation for the simple reason that it was not Congress's intent at the time of the enactment of the statute to expand state jurisdiction in this fashion. In fact, the *Swatzel* court expressly found that Congress did not intend to extend this statute to Indians employed on the reservation:

> "An examination of Senate Committee Report accompanying this act, S.R. 2294, 74th Congress, 2nd Session reveals that the inclusion of Indians within the application of this statute was not the intention of Congress." *Id.*, at 154.

Such a result is consistent with common sense for a variety of reasons. First, while Congress intended to close a "gap" in the field of workmen's compensation, such an intent would not logically apply to the reservation since there is no "gap" on the reservation. Since the execution of the Treaty of 1868, the Navajo government has been possessed of the right to legislate concerning Indian labor affairs on the reservation. This right of self-government includes the power to enact, or to choose not to enact, a workmen's compensation law that would apply to Indians employed on the reservation. If the Navajo tribal government considered workmen's compensation to be in the best interest of Indian employees, then the Navajo Nation could enact such a law. In short, the "gap" intended to be closed by Congress does not exist on the reservation.

Second, there is nothing in 40 U.S.C. §290 which would require the Navajo Nation to enact a workmen's compensation law. (Nor, for that matter, would the statute require a state such as Mississippi or Arkansas to enact such

legislation.) Thus, there is nothing in the act, or the legislative history underlying the act, that would show that 40 U.S.C. §290 divested any local sovereign government of its right to choose not to enact workmen's compensation legislation.

In fact, the purpose of the statute was to allow the local sovereign government to retain control over workmen's compensation legislation. As such, the statute, as interpreted in *Swatzell, supra,* is entirely consistent with a Congressional intent to permit the sovereign Navajo government to exercise its right of self-government on the Reservation.

Third, it cannot be presumed that Congress intended to abandon its special relationship to the Indians. If Congress intended to subject all Indian reservations to a workmen's compensation act, then it could certainly have enacted such legislation. However, it cannot be presumed that Congress intended to subject the various reservations to the whims and caprices of the individual state workmen's compensation act. Rather, if Congress found such legislation necessary, it is much more likely that Congress would have designed a workmen's compensation law that would have applied equally to all Indians on every reservation.

As in *Bryan v. Itasca County, supra,* there is no indication whatsoever in the legislative history that Congress intended to subject Indians to the jurisdiction of the Arizona Industrial Commission. The legislative history is silent on this point and, under the general rules of construction, the statute cannot be interpreted to abrogate Treaty rights in "the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations." *Id.*, at 384. Moreover, at the time that 40 U.S.C. §290 was enacted, the general rule pertaining to Congressional intent was that general acts of Congress were not applied to Indian reservations, unless so

worded as to clearly manifest an intention to include them in the operation. *Elk v. Wilkins,* 112 U.S. 9 (1884). Thus, when Congress enacted this statute, the general rules of statutory construction would presume that Congress did *not* intend that this act apply to Indians on the reservation.

Kerr-McGee argues that the statute must apply to Indians on the reservation because the reservation is a federal enclave. While it is true that the federal government holds legal title to reservation lands as trustee for its Indian wards, this fact is not controlling. The reservation differs substantially from the ordinary federal enclave in that the reservation (unlike a post office, a national park, et cetera) is inhabited by a sovereign nation that has, by virtue of its treaty with the federal government, preserved unto itself the rights of self-government.[5] In the absence of an express Congressional intent, the statute cannot be interpreted to terminate or diminish those rights.

---

[5]In this respect, the United States Supreme Court has stated, in *United States v. Antelope,* 430 U.S. 641 (1977), that the reservation does differ from other federal enclaves:

> "Congress has provided for federal jurisdiction over the crime of murder on a reservation, much as on other federal enclaves, 18 U.S.C. § §1111, 1153. But as our opinions have recognized that Indian reservations differ in certain respects from other federal enclaves, the statute has been construed as not encompassing crimes on the reservation by non-Indians against non-Indians." Id., p. 648, footnote 9.

Motion to Dismiss or Affirm

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No. 81-524

In the Supreme Court of the United States

OCTOBER TERM, 1981

IRENE H. JOHNSON, as surviving spouse of CHESTER JOHNSON, deceased,
Appellant,

VERSUS

KERR-McGEE OIL INDUSTRIES, INC.,
Appellee.

On Appeal from the Arizona Court of Appeals Division Two

MOTION TO DISMISS OR AFFIRM

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October, 1981

QUESTION PRESENTED

Appellant filed an action for money damages for the alleged wrongful death of appellant's decedent in a trial court of the State of Arizona. The trial court's ruling that appellant's proper remedy was before the Arizona Industrial Commission, which administers the Arizona Workmen's Compensation Act, was affirmed by the Court of Appeals and the Supreme Court of Arizona denied review.

The question presented is: Whether the extension of the remedy afforded by the Arizona Workmen's Compensation Act to appellant, in lieu of the remedy afforded by the Arizona Wrongful Death Act, offends the Constitution of the United States, a federal statute or a treaty?

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No. 81-524

In the Supreme Court of the United States

OCTOBER TERM, 1981

IRENE H. JOHNSON, as surviving spouse of CHESTER JOHNSON, deceased,
Appellant,

VERSUS

KERR-McGEE OIL INDUSTRIES, INC.,
Appellee.

On Appeal from the Arizona Court of Appeals Division Two

MOTION TO DISMISS OR AFFIRM

STATEMENT

Appellant filed suit against Kerr-McGee Oil Industries, Inc. ("Kerr-McGee") in a superior court of the State of Arizona for the alleged wrongful death of appellant's husband. Appellant filed the action on behalf of herself and her minor children. Appellant alleged that her husband died from squamous cell carcinoma of the lung, allegedly contracted while appellant's decedent was in the employ of Kerr-McGee. It is alleged that appellant's decedent worked as a miner in a uranium mining facility near Cove, Arizona.

The mining facility was located within the boundaries of the Navajo Indian Reservation in Arizona. The facility was formerly leased to Kerr-McGee by the Navajo Tribe

pursuant to a contract approved by the Tribe and the Secretary of the Interior.

It is not disputed that Kerr-McGee complied with all applicable provisions of the Arizona Workmen's Compensation Act during the life of the leases.

The trial court dismissed appellant's wrongful death action on the ground that, under the system of remedies which the State of Arizona has enacted, the exclusive forum for adjudication of appellant's claim is the Arizona Industrial Commission. Arizona Revised Statutes §23-906.

Appellant appealed to the Arizona Court of Appeals, contending that Arizona's Workmen's Compensation Act did not apply to appellant, or her decedent, because both appellant and her decedent were Navajo Indians who resided on the Navajo Reservation during the relevant time period. Appellant claimed a right to invoke the provisions of the Arizona Wrongful Death Statute, Arizona Revised Statutes, §12-611, rather than the Arizona Workmen's Compensation Act.

The Arizona Court of Appeals held that the substantive statutory law of Arizona, including its Workmen's Compensation Act, applied to appellant and affirmed the trial court.

The Court of Appeals explained that all Arizona tribunals are open to any person who invokes their jurisdiction, and that the system of remedies which the Arizona legislature has made available to litigants in Arizona is applied nondiscriminatorily, offering appellant the same rights and remedies as any other litigant would receive.

The Court of Appeals agreed with the trial court that appellant's proper remedy was before the Arizona Industrial Commission. The court below noted that any doubt as to the applicability of Arizona's Workmen's Compensation Act was removed by 40 U.S.C. §290. By that statute, Congress has specifically made state workmen's compensation statutes applicable to federally owned or held lands within the several states. J.S. App.A., pp.4a-7a.

Appellant contends that application of the remedy afforded by the Arizona Workmen's Compensation Act impinges upon the quasi-sovereign status of the Navajo Tribe and is preempted by the United States Constitution, an unidentified federal statute, or the 1868 treaty with the Navajo Tribe. Appellant asserts the reverse is true, however, as to the provisions of Arizona's Wrongful Death Act.[1]

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[1] Appellant brought a parallel suit in the United States District Court for the District of Arizona, *Johnson* v. *Kerr-McGee Oil Industries, Inc.*, invoking the District Court's diversity jurisdiction. The District Court dismissed the action on the same ground as had the state courts. J.S., App.F. The United States Court of Appeals for the Ninth Circuit summarily affirmed. J.S., App.G.

ARGUMENT

The appeal should be dismissed for want of a substantial federal question. Alternatively, the judgment of the Arizona Court of Appeals should be summarily affirmed.

(1) The decision of the Arizona Court of Appeals is clearly correct and is in accord with all relevant decisions of this Court. Further review is, therefore, unwarranted.

The only issue in this case is whether appellant's claim is properly adjudicated under Arizona's Workmen's Compensation Act or under Arizona's Wrongful Death Act. The federal question presented, if any, is clearly insubstantial. *Richardson* v. *Belcher*, 404 U.S. 78, 82, n.4, 83-84 (1971) ("The . . . purpose of state workmen's compensation laws was to satisfy a need inadequately met by . . . tort claim awards."); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 7-10 (1976); *Duke Power Company* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 and nn.32, 33 (1978).

The allegations in appellant's complaint, taken as true, demonstrate that the alleged injury to appellant's decedent occurred as a result of her decedent's employment by Kerr-McGee. The courts below simply held that, under Arizona law, Arizona Revised Statutes, §23-906, the proper tribunal in which to adjudicate appellant's claim is the Arizona Industrial Commission because the claim allegedly arose out of the employment of appellant's decedent by Kerr-McGee.

Arizona, in common with most American jurisdictions, has enacted a statutory provision which states, in substance,

that the remedy by way of a claim for workmen's compensation, if applicable, is exclusive. *Id.*[2]

Appellant suggests that application of the remedy provided by the Arizona Workmen's Compensation Act to her cause of action impinges upon the Indian Commerce Clause of the Constitution, Art. I, §8, cl.3, or an unnamed federal statute. The basis for the suggestion is appellant's allegation that she, and her late husband, were both members of the Navajo Tribe and that the injury complained of arose while appellant's decedent was working on the Navajo Reservation in Arizona.

Assuming this to be true, the Constitution is in no way implicated by the decision below. *Schrimpscher* v. *Stockton*, 183 U.S. 290 (1902); *Kendall* v. *Ewert*, 259 U.S. 139, 149-150 (1922); *Richardson* v. *Belcher, supra.*

Appellant points to no federal statute which is alleged to be abridged by the decision below. There is none. The only relevant federal statute, 40 U.S.C. §290, expressly provides that state workmen's compensation statutes are applicable to land located within the borders of one of the several states over which the federal government exercises responsibility. 40 U.S.C. §290 is, by its terms, applicable to federal land owned or held in trust by the United States. The Navajo Reservation is held in trust by the United States for the benefit of the Tribe.

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[2] The Arizona Court of Appeals held that, as a matter of state law, appellant had failed to plead any exception to the Arizona Workmen's Compensation Act. These state law questions are not, of course, open for review here. Appellant does not suggest otherwise.

The Court has long recognized that the desire of Congress in enacting statutes such as 40 U.S.C. §290 was to maintain

> "... similarity between the municipal laws of the state and those of the federal parcel [within its borders, and that] Congress has legislated specifically to incorporate state workmen's compensation acts into the law applicable thereto." *James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 100-101 and nn.9, 10 (1940).

Accord, Evans v. *Cornman*, 398 U.S. 419, 424 (1970).

The Arizona Court of Appeals correctly construed 40 U.S.C. §290 in this case. *See, e.g., Sadrakula, supra; Capetola* v. *Barclay White Co.*, 48 F.Supp. 797 (E.D. Pa. 1943) *affirmed*, 139 F.2d 556, 558-560 (3rd Cir.) *certiorari denied*, 321 U.S. 799 (1944); *Roleofs* v. *United States*, 501 F.2d 87, 90 n.8 (5th Cir. 1974); *Griffin* v. *United States*, 644 F.2d 846, 848 (10th Cir. 1981).

(2) Appellant also suggests that application of Arizona's Workmen's Compensation Act to her particular claim violates the Navajo Treaty of 1868, 15 Stat. 677. The assertion is without merit. The Court held early, and reaffirmed recently, that nondiscriminatory application of state substantive law to a claim or defense put forth by an individual member of an Indian Tribe suing a non-Indian impinges upon no federal interest. *Felix* v. *Patrick*, 145 U.S. 317, 331 (1892) (laches); *Schrimpscher* v. *Stockton*, 183 U.S. 290 (1902) (statute of limitations); *Kendall* v. *Ewert*, 259 U.S. 139, 149-150 (1922) ("There being no congressional legislation providing for the administration of such intestate property [of a member of the Quapah Indian

Tribe], the state law is applicable. . . ."); *United States* v. *Candelaria*, 271 U.S. 432, 444 (1926) (New Mexico law applicable in suit to quiet title to land of member of Pueblo Indian community); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 149 (1973) (absent explicit federal law to the contrary, Indians asserting claims in state courts are generally subject to "non-discriminatory state law otherwise applicable to all citizens of the state."). It is, thus, settled that "[i]n the absence of statute, Indian litigants are subject to the same defenses as other people." F. Cohen, *Federal Indian Law*, p.543 (1958 ed.).

(3) Appellant calls attention to the holding of the Court that the Navajo Treaty of 1868 reserved to the Tribe the right to "make their own laws and be ruled by them." *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). *See also, Montana* v. *United States*, ... U.S. ....., 101 S.Ct. 1245 (1981). The general principle may be conceded. It has no application here.[3] Neither Kerr-McGee nor the State of Arizona is attempting to "make" any law for the Navajo Tribe nor to prevent the Navajo Tribe from being "ruled" by such laws as it cares to enact. The State of Arizona has simply provided a neutral judicial forum which appellant voluntarily invoked against a non-Indian defendant. Kerr-McGee,

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[3] *Williams* v. *Lee, supra*, presented the mirror-image opposite of this case. *Williams* was a suit by a non-Indian against an Indian residing on the Navajo Reservation and involved an attempt to impose liability upon an Indian defendant. It would be hard to find a more inapposite citation. And it does not require extended argument to demonstrate that cases involving the special problems arising from state taxation of Reservation activities, such as *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685 (1965) or *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973), are utterly irrelevant here.

far from attempting to impinge upon the power of the Navajo Tribe to enact such laws as it may deem appropriate, has merely pointed out that, under Arizona law, applicable in Arizona tribunals, appellant's claim is governed by the Arizona Workmen's Compensation Act, rather than the Arizona Wrongful Death Act, because the injury complained of is alleged to have arisen out of and in the course of the employment of appellant's decedent by Kerr-McGee.

No law enacted by the Navajo Tribe is infringed by the holding that this is a correct interpretation of Arizona law. Quite the contrary. In 1978, the Navajo Tribe enacted a Workmen's Compensation Act which, like the Arizona Workmen's Compensation Act, provides a schedule of benefits and makes the remedy by way of workmen's compensation exclusive, absent stated exceptions. 15 Navajo Tribal Code, §§1001, 1002(D), 1003 and 1013. As appellant concedes, J.S., p.9, n.5, neither this provision nor any other Navajo Tribal Code provision is applicable to appellant's claim.

It is frivolous to suggest that nondiscriminatory application of a neutral provision of Arizona state substantive law to a litigant who voluntarily invokes an Arizona court's jurisdiction somehow impinges upon the right of the Navajo Tribe to make its own laws for its members or their right to be ruled by those laws. As appellant concedes, there is no Navajo tribal ordinance which is jurisdictionally applicable. The relevant federal statute, 40 U.S.C. §290, specifically authorizes application of the state's workmen's compensation statute to a factual situation such as this case presents.

Indeed, the 1978 Navajo tribal workmen's compensation enactment, 15 Navajo Tribal Code §1002(D), specifically excludes from its coverage an independent contractor such as Kerr-McGee was during the time Kerr-McGee maintained mining facilities on the Reservation, in the absence of an express provision to the contrary between the contractor and the Tribe. It would seem that one apparent reason for the exclusion of non-Indian independent contractors was the knowledge of the Navajo tribal governing body that Navajo workers employed by non-Indian independent contractors were already covered by the remedial provisions of the Arizona Workmen's Compensation Act.[4]

Appellant asserts that this neutral application of state statutory law to all litigants in Arizona state courts will "set a precedent not only denying a remedy to unwitting victims of private industry but even of denying them a forum in which to seek a just and reasonable remedy." J.S., p.9.

This novel contention is, in essence, an attack upon the wisdom of the uniform course of decision in virtually all American jurisdictions, state and federal, to replace tort actions for money damages with workmen's compensation acts as the appropriate remedy for injuries occurring in

[4] The Arizona Industrial Commission, appearing as *amicus curiae* in the Court of Appeals, assured the court that Navajo tribal members have always been held to be eligible for receipt of workmen's compensation benefits under the Arizona Workmen's Compensation Act, and that mutual cooperation between the Navajo Tribe and the Commission is of long standing. The Commission also pointed out that acceptance of appellant's assertions would both damage the state's Compensation Act fund and leave many Navajo workers with no practical remedy for injuries suffered by them.

an industrialized society. The wisdom of the underlying policy is, needless to say, a matter for legislative consideration. *Richardson* v. *Belcher*, 404 U.S. 78, 82-84 (1971). The Court has recognized throughout this century that the cumbersome and expensive litigation entailed by traditional tort actions for damages may be inapplicable in hazardous industries, and that a system of prompt inexpensive and quickly determinable compensation may properly and justly be enacted in its stead. *New York Central Railroad Company* v. *White*, 243 U.S. 188 (1917); *Crowell* v. *Benson*, 285 U.S. 22 (1932); *Richardson* v. *Belcher, supra.*

Congress has long held the same view, and has consistently expressed it in legislation such as 40 U.S.C. §290. *See, James Stewart & Co.* v. *Sadrakula, supra*, 309 U.S., at 100-101; *Evans* v. *Cornman, supra*, 398 U.S., at 424. And, as pointed out above, the Navajo Tribe shares that view. 15 Navajo Tribal Code §§1001, *et seq.*

The decision below sets no "precedent". It is in accord with all decisions in which an issue such as this has been adjudicated. *See, e.g., Navajo Tribe* v. *National Labor Relations Board*, 288 F.2d 162, 166 (D.C.Cir.) *certiorari denied*, 366 U.S. 928 (1961), *and, Paiz* v. *Hughes*, 76 N.M. 562, 417 P.2d 51 (1966), both of which were correctly relied upon by the court below. Appellant cites no case to the contrary. There is none. Far from "denying a forum" to injured workmen, the court below emphasized that the forum which can provide the efficient and expeditious remedy for workmen injured in the course of employment — the Industrial Commission — is open to all employees within the State of Arizona on equal terms. App.A, pp.6a-7a.

As both Kerr-McGee and the Arizona Industrial Commission pointed out in the courts below, it is appellant's argument which, if accepted, might well deny to many Navajo workmen in Arizona a just, speedy and efficient remedy for injuries arising out of their employment.

(4) Nor is any interest of the federal government impinged by the clearly correct decision below. In a closely analogous case, *Paiz* v. *Hughes*, 76 N.M. 562, 417 P.2d 51 (1966), the United States, appearing as *amicus curiae*, successfully urged that the New Mexico state courts had — and should exercise — jurisdiction over claims for personal injuries arising out of accidents occurring on an Indian Reservation located within the state.[5] In exercising such jurisdiction, state tribunals necessarily apply state substantive law in the absence of a controlling federal statute. *Kendall* v. *Ewert, supra*, 259 U.S., at 149-150; *United States* v. *Candelaria, supra*, 271 U.S., at 444.

(5) Lastly, appellants argument that she possesses some federally guaranteed "right" to invoke a state tort remedy, rather than the remedy afforded by the state's workmen's compensation act, is one which has been repeatedly rejected by the Court. In its most recent encounter with such a contention, the Court deemed the assertion so clearly repudiated by its prior decisions that it disposed of the assertion in two succinct footnotes. *Duke Power Company* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88, nn.32, 33 (1978), *citing, inter alia, Second Employers*

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[5] *See also, United States* v. *State Tax Commission*, 505 F.2d 633, 637 (5th Cir. 1974), *affirmed on rehearing*, 535 F.2d 300, 306 (5th Cir.) *rehearing en banc denied*, 541 F.2d 469 (5th Cir. 1976).

Liability Act Cases, 2 U.S. 188 (1912); *Silver* v. *Silver*, 280 U.S. 117 (1929), *and*, *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. 1 (1976).

The decision of the Arizona Court of Appeals is clearly correct and presents no substantial federal question warranting plenary review by the Court.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question, or, alternatively, the judgment should be summarily affirmed.

Respectfully submitted,

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October, 1981

CERTIFICATE OF SERVICE

This is to certify that the undersigned, a member of the Bar of the Supreme Court of the United States, has mailed three (3) copies of the foregoing Motion to Dismiss or Affirm in conformity with Rule 28 of the Supreme Court Rules to:

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this ..... day of October, 1981, by certified mail, with postage fully prepaid thereon, and to further certify that all parties required to be served have been served.

.....
Bernard J. Rothbaum, Jr.

Appellant's Reply Brief

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vs.

KERR-McGEE OIL INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE ARIZONA COURT OF APPEALS
DIVISION TWO

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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ON APPEAL FROM THE ARIZONA COURT OF APPEALS
DIVISION TWO

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

INTRODUCTION

KERR-McGEE's argument that there is no "substantial Federal question" raised by state assertion of regulatory jurisdiction over Indian employees working on an Indian Reservation does not require further reply. *Williams v. Lee,* 358 U.S. 217 (1959), *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685 (1965), *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164 (1973).

However, KERR-McGEE's argument that application of the laws of the State of Arizona and extension of the jurisdiction of the Arizona Industrial Commission onto the Navajo Reservation in no way infringes upon the right of the Navajo Tribe to make its own laws and be ruled by them so ignores both Appellant's original argument and the basic precepts of Federal Indian Law as to require reply.

ARGUMENT

KERR-McGEE takes the position that the right of the Navajo Nation to enact its own legislation and to be ruled by its own law "has no application here." (M.D.A., p. 7) KERR-McGEE argues that the Opinion of the Arizona Court of Appeals does nothing more than apply Arizona Workmans' Compensation Law in a "neutral" fashion to all residents of the State of Arizona, including members of the Navajo Tribe who live, and work, on the Navajo Reservation. KERR-McGEE argues that it is not for this Court to consider the efficacy of Arizona Workmans' Compensation, but rather "the wisdom of the underlying policy is, needless to say, a matter for legislative consideration." (M.D.A., p. 10)

This is exactly Appellant's point: The necessity of a Workmans' Compensation Act that would apply to a Navajo Indian who lives on the Navajo Reservation, works on the Navajo Reservation, raises his family on the Navajo Reservation, and dies on the Navajo Reservation, is a matter that is properly directed to the legislative consideration of the Navajo Tribal Council. Under the Navajo's right of sovereignty, which is guaranteed to the Tribe under the Treaty of 1868, the Tribal Council is vested with the

authority to enact a Workmans' Compensation legislation that would apply to an individual such as CHESTER JOHNSON or choose not to enact such legislation.

In this case, the Opinion rendered by the Arizona Court of Appeals deprives the Navajo Tribal Council of this right. The Opinion has the effect of declaring that every Navajo Indian who is employed on the Navajo Reservation is subject to a Workmans' Compensation law that has been enacted, not by the Tribal Council, but by the Arizona legislature. It is exactly for this reason that the case at bench raises substantial Federal issues.

The fact that the Navajo Tribe has enacted a Workmans' Compensation Law, 15 Navajo Tribal Code, § 1001 *et seq.* demonstrates the fact that, in the wisdom in the Navajo legislature, Arizona's Workmans' Compensation legislation should not apply to a Navajo employee of an independent contractor. KERR-McGEE suggests that the Navajo Workmans' Compensation Law only excludes "non-Indian independent contractors . . ." (M.D.A. p. 9). This is clearly incorrect; the Navajo Workmans' Compensation statute does not apply to a Navajo employee who is employed by an independent Navajo employer upon the Reservation. In short, in the wisdom of the Navajo Tribal Council, the limited remedy of Workmans' Compensation should not be applicable to a Navajo employee on the Reservation unless the Navajo is employed by the Tribe itself. 15 Navajo Tribal Code, § 1001 *et seq.* (Appendix OA-1 *et seq.*)

KERR-McGEE argues that:

> "It would seem that one apparent reason for the exclusion of non-Indian independent contractors was the knowledge of the Navajo Tribal governing body that Navajo workers employed by non-Indian independent contractors were already covered by the remedial provisions of the Arizona Workmans' Compensation Act." (M.D.A. p. 9)

This assertion is incorrect for two reasons. First, the Navajo Tribal government did not simply exclude "non-Indian independent contractors" from the operation of the tribe's Workmans' Compensation Law. Rather, the Navajo Workmans' Compensation Law was designed to cover *only* Navajo Indians directly employed by the Navajo Tribe. The Tribal Workmans' Compensation Law makes no reference whatsoever to "non-Indian independent contractors"; rather, all Navajo employees, whether employed by Indian or non-Indian employers, are excluded from the operation of the Act unless they are directly employed by the Tribe. Second, KERR-McGEE's arguments suggest that the Tribe has by implication ceded Workmans' Compensation jurisdiction over Navajo employees on the Reservation to the Arizona State Government. This, of course, cannot be done, whether by implication or expressly. *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971). Any cession of jurisdiction must be done according to the express requirements of Public Law 280. 18 U.S.C. §1162, 28 U.S.C. §1360 *et seq*.

KERR-McGEE contends that the State of Arizona was authorized by 40 U.S.C. §290 to apply its Workmans' Compensation Act to Navajo Indians on the Reservation. We respectfully disagree. An examination of the statute, and the legislative history underlying the statute, mandates the conclusion that Congress did not intend that the statute would transfer Workmans' Compensation jurisdiction from the Indian government to the State government. In this respect, Congress certainly has the power to transfer such jurisdiction from the Indian nation to the State. However, acts of Congress have only been interpreted to divest the Indian nation of jurisdiction, and pass such jurisdiction to the State, where Congress has manifested an express intent to

accomplish such a purpose either in the statute itself or in the legislative history underlying the statute. See, *e.g.*, *Williams v. Lee, supra, McClanahan v. State Tax Commission, supra; Bryan v. Itasca County,* 426 U.S. 373 (1976). In this case, neither the statute nor the legislative history demonstrates that Congress intended to transfer Workmans' Compensation jurisdiction from the Tribal government to the State government.

Rather, the legislative history underlying the statute shows that Congress's only intent was to leave the question of Workmans' Compensation in the hands of local government. The statute was intended to allow the states to exercise Workmans' Compensation jurisdiction in Federal areas where there would otherwise be no local government capable of enacting such legislation. However, the evil sought to be remedied by Congress by enacting 40 U.S.C. §290 does not, and has never, existed on the Reservation. The Navajo Tribal Council, possessed of sovereign rights, has always had the authority to enact Workmans' Compensation legislation that would affect Tribal members working on the Reservation. Thus, the evil sought to be remedied by Congress (*i.e.*, a "gap" in the ability of local government to enact Workmans' Compensation legislation), has never existed on the Reservation.

Neither the statute, nor any of the Congressional reports which comprise the legislative history, address the issue of state jurisdiction over Indian Reservations. The legislative history accompanying the statute does not address any problems pertaining to Indian Reservations or the abrogation of Treaty rights. In fact, the word "Indian" is not even mentioned in the legislative history. See, House of Representatives Report 2656, 74th Congress, Second Session; Senate Report 2080, 74th Congress, Second Session;

Senate Report 2119, 74th Congress, Second Session; Senate Report 2294, 74th Congress, Second Session. In short, the circumstances surrounding the enactment of 40 U.S.C. §290, and the legislative history, indicate that the statute was not intended to divest the Tribal government of Workmans' Compensation jurisdiction or to pass such jurisdiction to the State government.

The Opinion from which this Appeal is taken (J.S., Appendix A) is not an Opinion which is phrased in the choice of law terms which KERR-McGEE's Motion to Dismiss or Affirm discusses. Rather, it is one which has the direct effect of applying an entire body of law — The Arizona Workman's Compensation Act — to on-Reservation employers and their Navajo employees. The basic questions presented hinge upon whether or not the State of Arizona can exert regulatory jurisdiction over the employment of Navajo Indians on the Reservation. The choice of law problem stressed by KERR-McGEE in its Motion to Dismiss or Affirm is merely one incidental effect of the Court of Appeals ruling, which does not go to the heart of the problem which Appellant has presented to this Court.

CONCLUSION

For the reasons cited above, this Court should note probable jurisdiction of this Appeal and deny KERR-McGEE's Motion to Dismiss or Affirm.

RESPECTFULLY Submitted this ____ day of _____, 1981.

STANLEY G. FELDMAN, ESQ.
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TITLE FIFTEEN

Labor

NEW CHAPTER SECTION

11. Workmen's Compensation 1001

Chapter 11. Workmen's Compensation

SECTION

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§ 1001. Establishment of program

There shall be a Workmen's Compensation Program for all employees of the Navajo Nation, including all enterprise employees, councilmen, Chapter officers, grazing committee members and others as set out in 15 N.T.C. § 1002(7) (a) and (b).

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 101, passed Aug. 22, 1978.

§ 1002. Definitions

In this chapter, unless the context otherwise requires:

(1) "Adoption" shall include cases where persons are treated as adopted as well as those of legal adoption.

(2) "Award" means the findings or decision of the review board

of the amount of compensation or benefits due an injured employee or the dependents of a deceased employee.

(3) "Child" includes dependent step-children, adopted children and acknowledged illegitimate children, but does not include married children unless they are dependents.

(4) "Claimant" means the injured covered member or dependents of same in the event of death of the covered employee.

(5) "Compensation" means the compensation and benefits provided by this chapter, i.e., "indemnity" means weekly disability payments, and "medical" means medical expense, mileage and other expenses associated with medical treatment.

(6) "Course and scope of employment" shall mean the time, place and circumstances under which the accident occurred. An injury must arise out of and in the course and scope of employment in order that a claim be compensable.

(7) "Covered member," "employee," "workman" and "CETA employee" means:

(A) Every person in the service of the Navajo Nation elected, appointed or hired and carried on the payroll of the Tribe, including all enterprise employees, councilmen, Chapter officers, grazing committee members; and,

(B) Volunteer fire fighters, in the course and scope of performing a service for the Navajo Nation as a volunteer fireman; this will apply only when the volunteer fireman is working under the direction and control of a recognized organization of the Navajo Nation; and,

(C) Every person employed by an organization that is considered a member of this chapter by assessment of and payment for compensation benefit premiums.

(D) Excluded as not in the employ of the Navajo Nation are consultants, independent contractors and all other persons not considered to be directly employed by the Navajo Nation unless a contractual agreement between the Tribe and a nonrelated entity provides for workmen's compensation. In that event, the contract shall be specific as to who, when, where and why this coverage is provided by the Navajo Nation; this will apply only when the nonrelated entity and covered members have agreed to all terms, conditions and provisions of this chapter.

(E) The final determination as to the employment status of an individual shall be made by the review board.

(8) "Death" is any fatality of the employee from work injury or occupational disease.

(9) "Dependents" are the following persons, and they only shall be deemed dependents under the provisions of this chapter:

(A) The widow or widower, if living with the deceased at the time of his death or legally entitled to be supported by him as a dependent;

(B) A child under 18 years of age, or incapable of self-support, unmarried and dependent upon the deceased;

(C) A parent or grandparent, if actually dependent upon the deceased;

(D) A grandchild, brother or sister, only if under 18 years of age, or incapable of self-support and dependent upon the deceased;

(E) A person is considered to be dependent upon the employee when requiring more than 50 percent contribution from the employee toward his support. The relation of dependency must exist at the time of the injury.

(10) "Intoxication" means blood alcohol content in excess of 10 percent or conviction of the offense of driving while intoxicated or words to that effect, by any lawful jurisdiction.

(11) "Minor employee" shall mean a minor working at an age and at an occupation legally permitted. Such minor shall be deemed of the age of majority for the purpose of this chapter. No other person shall have any claim or right to compensation for an injury to a minor workman, but an award of a lump sum of compensation to the minor employee shall be paid only to his legally appointed guardian.

(12) "Parent or grandparent" means the natural father or mother or the natural grandfather or grandmother of the deceased employee.

(13) "Pronouns" of the masculine gender used in this chapter shall apply to both sexes.

(14) "Review board" means the Workmen's Compensation Employee Benefit Review Board of the Navajo Nation, formerly known as the Disability Board.

(15) "Settlement" means the date the release of all claims is executed and the monetary terms of the agreement met.

(16) "Week" means seven calendar days, 30 calendar days equals one month.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 113, passed Aug. 22, 1978.

§ 1003. Acknowledgment of program

(a) All covered members shall be conclusively presumed to have elected to take workmen's compensation in accordance with the terms, conditions and provisions to include the schedule of benefits of this program by virtue of membership in the program; to include acknowledgment that the Navajo Tribe of Indians is, in fact, a sovereign nation for the purposes of workmen's compensation, governed by the laws as set forth by the Navajo Tribal Council and that no other state compensation law is applicable to injuries sustained by the covered members.

(b) The Personnel Services Department of the Navajo Tribe, the processing unit for the Comprehensive Employment and Training Act Program or the management of the enterprises and member organizations hiring employees, shall be responsible for explaining the provisions of this program to the employee and shall post in a conspicuous location a notice as follows:

NOTICE TO EMPLOYEES

All employees are hereby notified that the Navajo Tribe of Indians is a sovereign nation for the purposes of workmen's compensation, governed by the laws as set forth by the Navajo Tribal Council and that no other state compensation law is applicable to injuries sustained by an injured employee. If you do not fully understand the terms, conditions, provisions and schedule of benefits of the Tribal Workmen's Compensation Program, contact your supervisor for further details.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 102, passed Aug. 22, 1978.

§ 1004. Insurance fund—Purpose; administration

(a) There shall be a fund maintained for the purpose of payment for compensation claims and associated expenses as provided herein.

(b) The fund shall be part of the Workmen's Compensation Fund Account maintained on the records of the Financial Services Department.

(c) The funds shall be obtained by assessment of a percentage of that amount recovered for employee benefits, in conjunction with the Financial Services Department, Window Rock, Arizona, and/or by assessment charges to the various enterprises and departments based on a specified rate adjusted annually at the beginning of each

fiscal year based on the experience of the previous fiscal year. Collection shall be made by the Financial Services Department.

(d) Failure of a participating organization to pay the assessed amount within 60 days from date of billing shall subject that organization to possible suspension from this program, as deemed appropriate by the review board. Failure of a member organization to pay its share shall not affect the rates of other member organizations in good standing.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 104, passed Aug. 22, 1978.

§ 1005. —Rates

(a) The rates charged shall be at the direction of the Workmen's Compensation Employee Benefit Review Board, adjusted in accordance with the loss experience of each contributor on an annual basis. Payment of death claims or the equivalent shall not be charged directly against any one contributor but shall be distributed to all contributors; i.e., pooled to prevent excessive rates to any one contributor. Adjusted rates shall become effective at the beginning of the succeeding fiscal year following the announced adjustments.

(b) The review board, in fixing rates, shall provide for an adequate catastrophe reserve, reserves adequate to meet anticipated and unexpected losses, and other necessary reserves and surplus determined by the review board. The amount of surplus and reserves shall not be less than $500,000.

(c) The review board may, in its discretion, apply tentative rates subject to modification in accordance with the loss experience of each enterprise or department.

(d) An enterprise or other member organization who misrepresents to the review board the amount of payroll upon which the premium to be paid to the insurance fund is based is liable to a penalty of 10 times the amount of the difference in premium paid and the amount the enterprise or organization should have paid. The penalty shall be assessed by the review board and collected by the Financial Services Department at Window Rock, Arizona, and placed into the insurance fund. An organization assessed such a penalty shall have the right of appeal as in the case of a claimant, under 15 N.T.C. § 1011. Once a penalty is found just and payable, payment shall be made within 30 days thereafter or benefits for members of that organization shall be suspended until payment is made.

Source. Advisory Com. tee Res. ACAU-94-78, Workmen's Compensation Program, § 105, passed Aug. 22, 1978.

§ 1006. —Custodian; duties

(a) The Financial Services Department shall be custodian of the insurance fund; and all authorized disbursements therefrom shall be paid by the Financial Services Department, upon presentation of vouchers submitted and authorized by the Tribal Insurance Services Department Risk Manager or his representative within its stated authority.

(b) Internal control procedures will be established by the Financial Services Department.

(c) The fund shall be subject to an annual audit or more frequently, if requested by the Chairman of the Navajo Tribal Council.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 106, passed Aug. 22, 1978.

§ 1007. —Payment of benefits

The Insurance Services Department shall administer this chapter in accordance with the terms and conditions as described herein, and submit properly approved vouchers for payment to the Financial Services Department for all manner of compensation claims as provided for in the schedule of benefits. Contested claims shall be referred to the review board, which shall conduct hearings as the need may arise.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 107, passed Aug. 22, 1978.

§ 1008. Insurance Services Department—Powers and duties

(a) The Insurance Services Department shall be empowered to request medical reports, police reports, autopsy reports and special investigations, engage the services of adjusters and consultants, and perform other activity as required to process any claim for benefits or to further this chapter. Payments for expenses associated with this activity will be made at the direction of the Tribal Insurance Services Department's Risk Manager from the Workmen's Compensation Fund, by submitting vouchers to the Financial Services Department for payment upon approval by the Financial Services Department.

(b) Payment of claims shall be made at the direction of the Risk

investigations in such a manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out the spirit of this chapter.

(f) A full and complete record shall be kept of all proceedings held before the review board of an investigation and testimony, by a recording device or by a stenographer.

(g) The review board shall convene as necessary; but in no event will an employee be deprived of a hearing for more than 30 days from date of notice to the review board of his request for a hearing; provided:

(1) That the issue is to determine whether the claim is compensable or noncompensable;

(2) That the employee's condition is stationary for rating and award purposes, i.e., he is not under treatment, and the necessary factual information has been obtained, making a decision of the board possible;

(3) That the issue relates to the permanent and stationary condition of the claimant (15 N.T.C. § 1035).

(h) A claimant may request an evaluation for award purposes while remaining under medical treatment, with the approval of the review board.

(i) Any award agreed to by the claimant for benefits under this chapter shall constitute a full and final settlement and all benefits shall cease upon settlement, except where the award provides for other than a lump sum settlement. If other than a lump sum settlement, the terms of the award agreement shall apply.

(j) All parties shall have the right to continue the hearing after it has first convened for the purpose of further developing evidence.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 110, passed Aug. 22, 1978.

§ 1011. —Decision final

(a) The decision of the review board shall be by majority vote of no less than three members and a quorum shall consist of no less than five members.

(b) The decision of the review board shall be final, with the right of appeal resting with the Court of Appeals of the Navajo Nation. No court of the Navajo Nation, except the Court of Appeals of the Navajo Nation, on appeal, shall have jurisdiction to review, vacate, set aside, reverse, revise, correct, amend or annul any decision of the review board.

Manager of the Tribal Insurance Services Department or his authorized representative within the Workmen's Compensation Branch.

(c) Complete and accurate administrative records and claim files shall be maintained on all activities relating to the Workmen's Compensation Program. All closed files shall be preserved for not less than six years.

(d) The Insurance Services Department shall provide administrative support to the review board, make recommendations, and provide other assistance as deemed appropriate.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 108, passed Aug. 22, 1978.

§ 1009. Benefit Review Board—Membership

(a) There shall be a Workmen's Compensation Employee Benefit Review Board for the Navajo Nation. The review board shall be composed of a minimum of five regular members, one of which shall serve as chairman of the review board and two alternate members. The review board chairman and members shall be appointed by the Chairman of the Navajo Tribal Council.

(b) The Chairman of the Tribal Council may remove any member of the review board for cause.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 109, passed Aug. 22, 1978.

§ 1010. —Hearings

(a) Any member of the review board having a personal interest in the subject matter presented before the board shall immediately disqualify himself for cause and a previously appointed alternate member shall serve.

(b) The employee shall have the right to challenge for cause any member of the review board and in that event, a previously appointed member or members shall serve.

(c) The employee shall have the right to be represented by an attorney in all matters presented before the review board, to cross-examine all witnesses and to review all evidence of any nature, as may relate to the matter under consideration.

(d) The review board shall have the right to cross-examine the employee claimant and all witnesses and to perform such discovery activity as may be deemed necessary to fully explore all aspects surrounding the occurrence and injury.

(e) The review board shall not be bound by the rules of evidence or by technical or formal rules of procedure and may conduct

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 111, passed Aug. 22, 1978.

§ 1012. —Annual report

(a) The review board shall annually, on or before September 30, make a report to the Chairman of the Navajo Tribal Council for the preceding fiscal year. The report shall include:

(1) A statement of the number of awards made; and

(2) A general statement of the causes of accidents for which the awards were made; and

(3) A detailed statement of disbursements from the insurance fund; and

(4) Other matters which the board deems proper to call to the attention of the Chairman of the Navajo Tribal Council, including recommendations.

(b) The Insurance Services Department shall provide each organization which is a member of the workmen's compensation program a quarterly "Experience Report" providing information as to employees injured, amounts paid for indemnity and medical, and an annual explanation of the rate setting formula.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 112, passed Aug. 22, 1978.

§ 1013. Compensation as exclusive remedy

The right to receive compensation pursuant to the provisions of this chapter for injuries sustained by a covered member shall be the exclusive remedy against the Navajo Nation and employees thereof, except where the injury is caused by the fellow employee's willful misconduct and the act causing the injury indicates a willful disregard of life, limb or bodily safety of the insured employee, in which event, the injured employee may, at his option, either claim compensation or maintain an action at law for damage against the fellow employee or employees before the Navajo Tribal Courts.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 114, passed Aug. 22, 1978.

§ 1014. Choice of remedy as waiver of alternate remedy

(a) An employee, or his legal representative in event death results, who accepts compensation, waives the right to exercise any option to institute proceedings in court against an employee of the Navajo Nation.

(b) An employee, or his legal representative in event of death,

who exercises any option to institute proceedings in courts against an employee of the Navajo Nation as provided for in 15 N.T.C. § 1013, waives any right to compensation.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 115, passed Aug. 22, 1978.

§ 1015. False statement or representation to obtain compensation; penalty and forfeiture

If, in order to obtain any compensation, benefit or payment under the provisions of this chapter, any person willfully makes a false statement or representation, such person shall forfeit all rights to such compensation, benefit or payment upon proof that the offense was committed, as ruled by the review board, subject to the appeal provisions given in 15 N.T.C. § 1011.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 116, passed Aug. 22, 1978.

§ 1016. Injury reports

(a) Information obtained by the attending physician or surgeon while in attendance of the injured person shall not be a privileged communication if such information is required by the Navajo Nation for a proper understanding of the case and a determination of the rights involved.

(b) The Navajo Nation shall have the right to request a full and complete report from the physician or surgeon at times and in the form and details as deemed necessary and to present specific questions required to evaluate the claim.

(c) The covered person acknowledges the right of the Navajo Nation to obtain such information by the covered person's acceptance of the Workmen's Compensation Program of the Navajo Nation.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 117, passed Aug. 22, 1978.

§ 1017. Report of accident

(a) When an accident occurs to an employee, the employee shall immediately, or as soon as possible thereafter, report the accident and the injury resulting therefrom to his immediate supervisor, who in turn shall report to his department or organization, as appropriate.

(b) All accidents resulting in injury or death must be reported to the Navajo Nation Insurance Services Department within five

working days of the date of occurrence by the responsible department or organization.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 118, passed Aug. 22, 1978.

Notice to employees. ACAU-94-78, which this chapter is based on, provided, in Exhibit A:

"NOTICE TO EMPLOYEES
"ACCIDENTS

"PROTECT YOUR RIGHTS.

"REPORT ALL INJURIES IMMEDIATELY TO YOUR FOREMAN OR SUPERVISOR.

"OBTAIN AUTHORIZATION FOR MEDICAL EXAMINATION.

"RE: Workmen's Compensation Law of the Navajo Nation

"All employees are hereby notified that the Navajo Tribe of Indians is a sovereign nation for the purposes of Workmen's Compensation, governed by the laws as set forth by the Navajo Tribal Council and that no other State compensation law is applicable to injuries sustained by an injured employee. If you do not fully understand the terms, conditions, provisions and Schedule of Benefits of the Tribal Workmen's Compensation Program, contact your supervisor for further Details.

"KEEP POSTED IN A CONSPICUOUS PLACE"

§ 1018. Disclosure of pre-existing disabilities

(a) All employees of the Navajo Nation, its enterprises, divisions, departments and other covered organizations, shall disclose any pre-existing physical or mental disorder of disability at time of hire and before commencing employment or before becoming a covered person under this chapter, as provided herein.

(b) Any claim for aggravation of a pre-existing condition which was not disclosed may be declined by the review board under this chapter if that person had knowledge of the pre-existing condition and intentionally failed to disclose the pre-existing condition on the employment application.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 103, passed Aug. 22, 1978.

§ 1019. Right to compensation

Every covered person coming within the provisions of this chapter who is injured, and the dependents of every such covered person who is killed by accident arising out of and in the course of his employment, wherever the injury occurred, unless the injury was purposely self-inflicted or otherwise limited or excluded by the terms and conditions of this chapter, shall be entitled to receive, and shall be paid, such compensation for loss sustained on account of the injury or death or occupational disease, such benefits as are provided for by this chapter.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 119, passed Aug. 22, 1978.

§ 1020. Time limit for reporting of claims

(a) Claims for injury shall be made within one year from date of occurrence.

(b) Claims for occupational disease shall be made within one year from date of first notice by a physician; but in no event, longer than three years from the date employee terminates his employment with the Navajo Nation.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 143, passed Aug. 22, 1978.

§ 1021. Burden of proof

The burden of proof, except as set forth in 15 N.T.C. § 1022, shall rest upon the covered person, or his dependents in the case of death, to prove:

(1) That injury complained of was a result of an accident or occupational disease; and

(2) That it arose out of his employment; and

(3) That it arose while in the course of his employment.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 120, passed Aug. 22, 1978.

§ 1022. Presumptions

When a covered person is found dead by accident under circumstances indicating that the accident took place within time and place limits of employment and no conclusive evidence is present to exclude coverage as provided herein, it shall be the presumption that death arose out of employment and benefits shall be paid.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 121, passed Aug. 22, 1978.

§ 1023. Acting under employer's directions

Any covered person who is injured or killed while following the directions of his employer or his employer's agent shall be considered to have been in the course and scope of his employment and shall be entitled to compensation benefits.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 122, passed Aug. 22, 1978.

§ 1024. Aggravation of pre-existing disease or condition

If an injured person is suffering from a disease or injury at the

time the accident occurs and the disease or injury is aggravated thereby, the disease or injury is compensable for payment of medical and indemnity. For the purpose of settlement for permanent partial or permanent total disability, the amount of the award for that disability as set forth in the schedule of benefits may be reduced or denied in its entirety by the review board in consideration of the following:

(1) A prior settlement from any source for the same disability;

(2) A pre-existing physical disability, that disability being to a lesser degree than the disability currently claimed; payment for the extension of the original disability which resulted from the covered person's employment applicable under this chapter, i.e., the difference between the degree of disability of the employee before the covered accident or occupational disease and the degree of disability after the covered accident or occupational disease.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 123, passed Aug. 22, 1978.

§ 1025. Going to and returning from work

An accident occurring to an employee while on the way to or from work is not within due course of his employment unless such traveling is in connection with his work from the time his travel starts either at his place of work or his home. This will not apply if the employee deviates from a reasonably direct route of travel, not in the interest of the employer, or during other activities within the travel, not necessitated by the employment activity and not in the interest of the employer.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 124, passed Aug. 22, 1978.

§ 1026. Occupational disease

(a) Occupational disease is one that arises out of a particular trade or occupation from a particular industrial process. It is a disease to which a broker is not ordinarily subject or exposed to outside or away from his employment.

(b) It is the intent of this chapter to provide benefits for those employees who incur disability or death as a result of occupational disease such as, but not limited to, silicosis, chronic lead poisoning, loss of hearing, etc.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 125, passed Aug. 22, 1978.

§ 1027. Compensation precluded by neglect or refusal of employee to submit to treatment

No compensation shall be payable for the death or disability of an employee if his death is caused by, or insofar as his disability may be aggravated, caused or continued by, an unreasonable refusal or neglect to submit to or follow any competent or reasonable surgical treatment or medical aid.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 126, passed Aug. 22, 1978.

§ 1028. Injury or death by consumption or application of drugs or chemicals

No benefits of any nature shall be payable for injury and/or death caused or contributed to by any drug, except those drugs prescribed by a physician, including narcotics and hallucinogens, or any gas or fumes, taken or inhaled voluntarily, or by voluntary poisoning.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 144, passed Aug. 22, 1978.

§ 1029. Intoxication

Benefits shall not be payable for any covered person injured or killed while intoxicated as defined in 15 N.T.C. § 1002, regardless of whether or not the intoxicated condition was the proximate cause of the injury or death, i.e., it is necessary only to prove that the covered person was intoxicated at the time of the accident to deny benefits under this chapter.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 149, passed Aug. 22, 1978.

§ 1030. Act of God; limitations

Injury or death deemed an "act of God" shall be considered compensable provided other qualifying conditions are met, except injury or death which results from a natural cause, i.e., heart attack, stroke or other natural body function failure, not arising out of the employment.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 148, passed Aug. 22, 1978.

§ 1031. Periodic medical examination of employee; effect of refusal or obstruction of examination or treatment

(a) An employee entitled to compensation shall submit himself

for medical examination from time to time at a place reasonably convenient for the employee, if and when requested by the Insurance Services Department or the review board.

(b) The request for the medical examination shall fix a time and place having regard to the convenience of the employee, his physical condition and ability to attend. The employee may have a physician present at the examination if procured and paid for by himself.

(c) If the employee refuses to submit to the medical examination or obstructs the examination, his right to compensation shall be suspended until the examination has been made, and no compensation shall be payable during or for such period.

(d) Any physician who makes, or is present at, the medical examination provided by this section may be requested to testify as to the result thereof; and the cost of this appearance shall be at the expense of the Workmen's Compensation Program.

(e) The review board may reduce or suspend the compensation of an employee who persists in unsanitary or injurious practices tending to imperil or retard his recovery, or who refuses to submit to medical or surgical treatment reasonably necessary to promote his recovery.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 127, passed Aug. 22, 1978.

§ 1032. Liability of third person to injured employee; subrogation powers

(a) If a covered person entitled to compensation under this chapter is injured or killed by the negligence or wrong of another not in the employ of the Navajo Nation, its enterprises, divisions or other covered member organizations, such injured employee, or his dependents in the event of his death, may pursue his remedy against such other person while receiving benefits under this chapter.

(b) If the employee entitled to compensation under this chapter or his dependents do not pursue his or their remedy against such other person by instituting an action within one year after the cause of action accrues, the claim against such other person shall be deemed assigned to the Navajo Nation. Such a claim so assigned may be prosecuted or compromised by the Navajo Nation for benefits paid.

(c) If employee proceeds against such other person, compensation, medical, surgical, hospital benefits and death benefits shall be paid as provided in this chapter and the Navajo Nation shall have a

lien on the amount actually collectable from such other person to the extent of such compensation, medical, surgical, hospital benefits and death benefits paid. Compromise of any claim by the covered person or his dependents at an amount less than the compensation, medical, surgical, hospital benefits and death benefit provided for shall be made only with written approval of the review board.

(d) The Navajo Nation shall have the right of subrogation for the amount of payments made for indemnity or medical payments under this chapter, upon the completion of a settlement with the claimant.

(e) Any person eligible for benefits under this chapter, who may be eligible for benefits under the uninsured motorists provisions of the Tribal Automobile Comprehensive Program, must elect to recover benefits from either this Workmen's Compensation Program or the Tribal Automobile Comprehensive Program. In no event may a person receive benefits under both insurance programs.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 128, passed Aug. 22, 1978.

§ 1033. Waiting period

No indemnity benefits shall be allowed under the provisions of this chapter for any accidental injury which does not result in the workman's disability which lasts more than seven consecutive days. If the period of the workman's disability lasts for more than 28 consecutive days from the date of his accidental injury, indemnity benefits shall be allowed from the date of disability. An employee may not recover indemnity payments for the period of time that they are compensated by annual or sick leave, at the employee's option. Annual or sick leave time taken shall apply against the waiting period for indemnity payments. Compensation benefits for indemnity and medical payments shall not be payable for a period in excess of 520 weeks.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 129, passed Aug. 22, 1978.

§ 1034. Total disability; definition and qualifying requirements; limitations

(a) Total disability means complete incapacity to engage in an occupation as a result of an occupational injury or disease. Occupation means any vocation for which the employee is or becomes reasonably fitted by education, training or experience.

(b) Independently of any other cause, the entire and irrecoverable

loss of sight of both eyes, or the loss by actual severance through and above the wrist or ankle joint of both hands or feet, shall be considered total disability even if the employee shall engage in an occupation.

(c) An award of total disability shall be in the lieu of all lesser scheduled benefits that may be applicable to the injury that created the condition of total disability.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 146, passed Aug. 22, 1978.

§ 1035. Condition permanent, stationary and rateable; termination of benefits

When an employee's physical condition reaches a point where no further medical treatment is deemed appropriate or useful to correct a disability as supported by a competent medical authority:

(1) The employee's condition shall be considered permanent, stationary and rateable; and

(2) The employee shall be notified in writing that his condition is permanent, stationary and rateable and that all benefits, if being claimed at that time, shall cease 30 days from date of notice; and

(3) The employee shall be advised of the amount payable to him in accordance with the terms, conditions, provisions and schedule of benefits of this chapter; and

(4) The Insurance Services Department shall tender the amount payable to the employee within the 30-day termination period; and

(5) Failure of the employee to execute the required documents and to accept such payment shall constitute the employee's refusal to settle his claim; and

(6) The employee may request a hearing before the review board as provided for in this chapter.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 145, passed Aug. 22, 1978.

§ 1036. Notice by disabled employee of absence from locality

No employee may leave the locality in which he is receiving treatment, while the necessity of having medical treatment continues, without written approval of the review board. Any employee leaving the locality in which he is receiving medical treatment without such approval may forfeit his right to compensation during such time, as well as his right to reimbursement for his medical expenses and any aggravation of his disability.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 138, passed Aug. 22, 1978.

§ 1037. Compensation for death

If an accidental injury sustained by a workman proximately results in his death within two years following his accidental injury, compensation shall be paid in the amount and to the persons entitled thereto, as follows:

(1) If there be no eligible dependents, compensation shall be limited to the funeral expenses, not to exceed $2,500, and the expenses provided for medical and hospital services for the deceased, together with all other sums which the deceased should have been paid for compensation benefits up to the time of his death, payable to the estate of the deceased;

(2) If there be eligible dependents at the time of the workman's death, payment shall consist of a lump sum as set forth in the schedule of benefits.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 130, passed Aug. 22, 1978.

§ 1038. Line of dependency; payment of benefits

The line of dependency for payment of death benefits shall be in the order set out below, provided each qualifies as a dependent under the terms and conditions of this chapter:

(1) First to the surviving spouse, if there are no children. If dependent children exist at time of employee's death, payment is to widow or widower, subject to the provisions of 15 N.T.C. § 1039;

(2) If no surviving spouse, to the dependent single child, 100 percent of death benefit; or if more than one dependent child, to be divided among such dependent children, share and share alike;

(3) To a parent or parents, if no surviving spouse or eligible children, if dependent upon the deceased employee, 100 percent of death benefit if only one parent; to be divided among both parents if both are dependent upon deceased employee, share and share alike;

(4) If there are no eligible dependent spouse, children or parents, the death benefit shall be divided among all other eligible dependents, share and share alike.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 131, passed Aug. 22, 1978.

§ 1039. Apportionment of compensation

Compensation to a dependent widow or widower shall be for the

use and benefits of the widow or widower and the dependent children; and the review board may, upon proper application at time of award, apportion the compensation between them in such a way as it deems best for the interest of all beneficiaries.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 132, passed Aug. 22, 1978.

§ 1040. Artificial members

In all cases where the injury is such as to permit the use of artificial members, including teeth and eyes, the Workmen's Compensation Program shall pay all expenses connected with the artificial member.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 133, passed Aug. 22, 1978.

§ 1041. Replacement of artificial members

The Workmen's Compensation Program shall, during the lifetime of the employee, replace or repair any artificial member or members, including dentures and artificial eyes, that were originally provided the injured employee by the program.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 147, passed Aug. 22, 1978.

§ 1042. Hernia

Employees, in order to be entitled to compensation for a hernia, must clearly prove:

(1) That the hernia is of recent origin;

(2) That this appearance was accompanied by pain;

(3) That this was immediately preceded by some accidental strain suffered in the course of employment; and

(4) That it did not exist prior to the date of the alleged injury. If a workman, after establishing his right to compensation for a hernia, as provided above, elects to be operated upon, the operating fee and reasonable hospital expenses shall be paid by the Workmen's Compensation Program. In case such workman elects not to be operated upon and the hernia becomes strangulated in the future, the results from the strangulation shall not be compensated.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 134, passed Aug. 22, 1978.

§ 1043. Disfigurement benefits

For serious permanent disfigurement about the body, in addition to other compensation benefits that may be allowed under this

chapter, an additional sum for compensation on account of the serious permanent disfigurement, as the review board deems just, may be paid, not to exceed $2,500.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 135, passed Aug. 22, 1978.

§ 1044. Vocational rehabilitation services

In addition to the medical and hospital services provided, the employee shall be entitled to such vocational rehabilitation services, including retraining or job placement, as may be necessary to restore him to suitable employment when he is unable to return to his former job. Such additional compensation shall not exceed $3,000.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 136, passed Aug. 22, 1978.

§ 1045. Eyewear

The Workmen's Compensation Program shall pay for frames and/or lenses of a like kind and quality as any damaged as a result of an accident which results in a compensable injury to the employee during the course and scope of his employment, but shall not pay for eye examinations unless there is a potential injury to the employee's eyes from the occurrence.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 140, passed Aug. 22, 1978.

§ 1046. Clothing

An employee who incurs damage to his clothing during an accident which results in a compensable injury shall be paid for replacement clothing of a like kind and quality.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 141, passed Aug. 22, 1978.

§ 1047. Travel to and from a medical facility

The injured employee shall be compensated for mileage to and from a medical facility at a rate consistent with the travel allowance authorized by established Tribal travel policy in effect at the time the travel was performed. The injured employee may be compensated for food and lodging while receiving medical treatment in excess of 100 miles from his home of record at a rate consistent with the per diem allowance authorized by established Tribal travel policy in effect at the time the expense was incurred.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 142, passed Aug. 22, 1978.

§ 1048. Compensation exempt from execution

Compensation shall be exempt from claims of creditors and from any attachment, garnishment or execution; and it shall be paid only to such workman or his personal representative or such other persons as the review board may, under the terms of this chapter, appoint to receive or collect the same.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 137, passed Aug. 22, 1978.

§ 1049. Benefits

(a) A schedule of benefits shall be established by the Advisory Committee of the Navajo Tribal Council, reviewed annually during the first session after commencement of the new fiscal year for adjustments as the need might appear, and shall become a part of this chapter upon date of certification.

(b) If an injury or occupational disease has left the covered member with a permanent bodily impairment, compensation for a specified number of weeks is payable, in one lump sum, without regard to presence or absence of wage loss in the future. For loss or loss of use of body members, schedules of the number of weeks for which compensation is payable are provided.

(c) For other nonscheduled permanent impairments, a calculation of percentage of total permanent disability is made. The award made pursuant to the schedule of benefits is the exclusive remedy. This is not, however, to be interpreted as an erratic deviation from the underlying principle of compensation law as found in many states. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one instead of a specifically proven one based on the individual's actual wage loss experience. The effect must necessarily be a presumed one, since it would be obviously unfair to appraise the impact of a permanent injury on earning capacity by looking at the employee's earning record for some relatively short temporary period preceding the compensation award. The alternative is to hold every compensation case involving any degree of permanent impairment open for a lifetime, making specific calculations of the effect of the impairment on the employee's earnings each time the employee contends that his earnings are being adversely affected.

(d) To avoid this protracted administrative task for which the Nation may lack trained personnel, the schedule of benefits approach has been devised.

(e) For the purpose of this chapter, scheduled losses are recognized in three forms, presenting an ascending degree of difficulty: loss of a particular member, loss of use of a member and unscheduled or more generalized impairments which are rated on the percentage of disability (loss of total body function) of the entire body, from the scheduled amount for permanent total disability.

(f) A total loss of use of a member exists whenever, by reason of injury, such member no longer possesses any substantial utility as a member of the body.

(g) The percentage of permanent partial disability, i.e., partial loss of use of the member or entire body, is arrived at by calculating the percentage that the proven disability bears to the total disability, i.e., total loss of use of the member or entire body.

(h) The unit by which weekly indemnity payments are measured consists of 66⅔ percent of the "average weekly wage". The computation of average weekly wage is based upon gross actual wages during the preceding 90-day period. Average weekly wages shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 90 days immediately preceding the date of the injury; but where for exceptional reasons the foregoing would be unfair, either to the employee or the Navajo Nation, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury. Maximum weekly indemnity payable is $200. Disability benefits are measured by multiplying the gross average weekly wage times the number of weeks reflected in the schedule of benefits, or percentage thereof in a case of partial disability.

SCHEDULE OF BENEFITS

(i) All persons earning less than $125 per week shall be rated at a weekly wage of $125, regardless of income, for the purpose of determining benefits under this chapter.

(j) Maximum award for a single disability or combination of disabilities paid in accordance with the schedule of benefits is $40,000.

(k) *Schedule of benefits*

ARM

A. Dextrous

1. At or near shoulder ..... 60 weeks

2. At elbow	50 weeks
3. Between elbow and wrist	47 weeks
B. Nondextrous	
1. At or near shoulder	53 weeks
2. At elbow	47 weeks
3. Between elbow and wrist	44 weeks
HAND	
A. Dextrous	37 weeks
B. Nondextrous	33 weeks
THUMB	
A. Total	17 weeks
B. At proximal joint	10 weeks
C. At distal joint	7 weeks
FIRST FINGER	
A. Including metacarpal	8 weeks
B. At proximal joint	6 weeks
C. At second joint	5 weeks
D. At distal joint	4 weeks
SECOND FINGER	
A. Including metacarpal	7 weeks
B. At proximal joint	5 weeks
C. At second joint	4 weeks
D. At distal joint	3 weeks
THIRD FINGER	
A. Including metacarpal	5 weeks
B. At proximal joint	4 weeks
C. At second joint	3 weeks
D. At distal joint	3 weeks
FOURTH FINGER	
A. Including metacarpal	5 weeks
B. At proximal joint	4 weeks
C. At second joint	3 weeks
D. At distal joint	3 weeks
ALL FINGERS—pertaining to one hand, except thumb	19 weeks

LEG	
A. At or near hip joint	60 weeks
B. At or above knee	47 weeks
C. Between knee and ankle	40 weeks
FOOT	
A. At ankle	33 weeks
GREAT TOE	
A. Including metatarsal	12 weeks
B. At proximal joint	5 weeks
C. At second joint	3 weeks
ONE TOE	
A. Including metatarsal	4 weeks
B. At proximal joint	3 weeks
C. At second joint	3 weeks
ALL TOES, same foot	12 weeks
EYE—ONE	
A. Total Blindness	37 weeks
EYE—BOTH	
See Total Disability	
EAR	
A. Total deafness, one ear	12 weeks
B. Total deafness, both ears	45 weeks
LOSS OF LIFE	125 weeks
TOTAL DISABILITY	125 weeks

(l) Other benefits

(1) *Mileage (see 15 N.T.C. § 1047).* Mileage from resident address of employee to the medical facility and return, based on mileage shown on official state maps as issued by the states involved, plus reasonable local mileage, not to exceed 20 miles per trip, upon presentation of a statement by the employee and signed by the employee, showing date or dates and points traveled. The rate shall be equal to the prevailing rate payable to Tribal employees for similar travel.

(2) *Meals and lodging (see 15 N.T.C. § 1047).* For employee

only, unless his condition warrants a relative or other person to assist; payment for this additional person shall be at the discretion of the Insurance Services Department. The allowable expense shall be equal to the prevailing amount payable to Tribal employees, for similar expense. For lodging, maximum per person, $17.50, unless a special circumstance would create a higher cost, an increase above the maximum is allowable at the discretion of the Insurance Services Department.

(3) *Land or air ambulance charges (for injured employees only).* Shall be recognized and payable under this chapter. Expenses for the return of an employee injured away from his place of employment, except by ambulance, are not reimbursable under this chapter, i.e., if an employee was sent to some distant locality by his organization, is injured, treated and released, that employee is considered to be in the charge of his organization for return travel expense.

(4) All claims for reimbursement must be supported by valid receipts showing the date and place of services, meals, lodging, etc., to be reimbursable.

Source. Advisory Committee Res. ACAU-94-78, Workmen's Compensation Program, § 150, passed Aug. 22, 1978.

Benefits comparison. ACAU-94-78, which enacted this chapter, provided, on the last page of the resolution, the following comparison:

"Comparison of the Tribe's current benefits, proposed increase and benefits payable by The State of Arizona.

"Figures based on a salary of $200.00 per week or $800.00 per month.

Injury and Number of Weeks		Current	New	State
Arm—Major	= 60 weeks	$ 7,000.00	$12,000.00	$26,400.00
Arm—Minor	= 53 weeks	6,200.00	10,600.00	22,000.00
Hand—Major	= 37 weeks	4,300.00	7,400.00	22,000.00
Hand—Minor	= 33 weeks	3,900.00	6,600.00	17,600.00
Thumb	= 17 weeks	1,950.00	3,400.00	6,600.00
Leg	= 60 weeks	7,000.00	12,000.00	22,000.00
Foot	= 33 weeks	3,900.00	6,600.00	17,600.00
Loss of Life	= 125 weeks	15,000.00	25,000.00	See footnote #1
Total Disability	= 125 weeks	15,000.00	25,000.00	See footnote #2

"Footnotes:

"#1 State pays widow 35 percent of average monthly wage for life of widow or until remarriage, if remarried, 2 years compensation in one lump sum.

"#2 66.75 percent of average monthly wage for life. If injured employee lived 30 years state would pay $53,400.00."

TITLE SEVENTEEN

Law and Order

CHAPTER		SECTION
1.	Enforcement of the Criminal Code	101
2.	General Provisions	201
3.	Offenses	301

Prior law. CN-71-77, § 1, repealed chapters 1 and 3 of this title and enacted new Chapters 1, 2 and 3. Repealed Chapter 1 was entitled "Enforcement of Law and Order Regulations" and related to the Tribe's assumption of responsibility for enforcement of regulations, and to authority to enter into cooperative agreements with federal and state agencies. It was derived from CJA-1-59, §§ 2 and 4. Repealed Chapter 3 was entitled "Offenses" and set out the various acts made crimes under Navajo Law. It was mainly derived from CJA-1-59, though many of its provisions were derived from the following resolutions:

1922–1951, Res. p. 206.	CJY-91-66
CJ-1-40	CO-65-67
CO-37-55	CJY-81-68
CM-28-56	CD-110-68
CJ-46-56	CF-10-69
CO-54-56	CF-27-69
CA-69-57	CJA-5-70
CJA-11-60	CMY-37-70

Preamble. Tribal Council Res. CN-71-77, passed Nov. 10, 1977, which repealed Chapters 1 and 3 of this title and enacted a new Criminal Code, consisting of chapters 1, 2 and 3, contained the following preamble:

"Whereas: (1) The Navajo Tribal Council by Resolution CJA-1-59 adopted as the Tribal Law and Order Code the regulations of the Department of the Interior with certain specified exceptions; and

"(2) The Law and Order Code of the Department of the Interior adopted by the Navajo Tribal Council 18 years ago has outlived its usefulness to the Navajo Nation and must be replaced by a criminal code that asserts the sovereignty of the Navajo Nation over criminal conduct committed by *any person* within the territorial jurisdiction of the Courts of the Navajo Nation; and

"(3) Because the present law and order code does not include numerous offenses which have only recently become serious law enforcement problems on the Navajo Indian Reservation, numerous offenders have gone unpunished and the dignity of the Navajo Tribal Government has suffered in the eyes of the Indian and non-Indian alike; and

"(4) Pursuant to a grant from the Governor's Council on Criminal Justice Planning of the State of New Mexico, the Codification of Laws Committee of the Navajo Tribal Council contracted with Mr. Louis Denetsosie and Ms. Claudeen Bates Arthur in December 1975, to revise Title 17; and